TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 373

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 11, 1936

CERTIORARI GRANTED APRIL 13, 1936

(36,766)

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FILMING

(30,863)

SUPREME COURT OF THE UNITED STATES

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THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 10, 1925

J43839

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1 Pleas in the District Court of the United States for the Northern District of Illinois, Eastern Division, begun and held at the United States Court Room, in the City of Chicago, in said District and Division, before the Honorable Adam C. Cliffe, District Judge of the United States for the Northern District of Illinois, on Saturday, the 19th. day of April, in the year of our Lord one thousand nine hundred and twenty-four, being one of the days of the regular April Term of said Court, begun Monday, the seventh day of April and of our Independence the 148th year.

Present:

Honorable Adam C. Cliffe, District Judge.

Robert R. Levy, U. S. Marshal.

John H. R. Jamar, Clerk.

2. 2 IN THE DISTRICT COURT OF THE UNITED STATES,

Northern District of Illinois,

Eastern Division.

United States of America,
Plaintiff
vs.
Atchison, Topeka and Santa Fe Railway Company,
Defendant
No. 33879

Be it remembered that heretofore, to wit: on the 2nd day of December, A. D. 1921, came the above named complainant, by its solicitor, and filed its bill of complaint, as follows:

3 IN THE DISTRICT COURT OF THE UNITED STATES,

For the Northern District,

of Illinois.

The United States of America,
Plaintiff,
vs.
The Atchison, Topeka & Santa Fe Railway Company,
Defendant.
No. 33879

Now comes the United States of America, by Charles F. Clyne, United States Attorney for the Northern District of Illinois and brings this action on behalf of the United States against the Atchison, Topeka & Santa Fe Railway Company, a corporation organized and doing business under the laws of the State of Kansas, and having an office and place of business at Chicago, in the State of Illinois; this action being brought upon suggestion of the Attorney General of the United States at the request of the Interstate Commerce Commission, and upon information furnished by said Commission.

4 For a First Cause of Action plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Illinois.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), defendant, during the twenty-four-hour period beginning at the hour of 6.00 o'clock, p.m. on July 6, 1921, at its office and station at Chicago, in the State of Illinois, and within the jurisdiction of this court, required and permitted its certain operator and employee, to wit: J. T. Bray, to be and remain on duty for a longer period than nine hours in said twenty-four-hour period, to wit: from said hour of 6.00 o'clock, p.m. on said date, to the hour of 6.00 o'clock, a.m. on July 7, 1921.

Plaintiff further alleges that during all the times mentioned herein said office and station was one continuously operated night and day, and that said employee, while required and permitted to be and remain on duty as aforesaid, by the use of the telegraph or telephone, dispatched, reported, transmitted, received, and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce.

Plaintiff further alleges that by reason of the violation of said Act of Congress, defendant is liable to plaintiff in the sum of five hundred dollars.

5 For a Second Cause of Action plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Illinois.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), defendant, during the twenty-four-hour period beginning at the hour of 6.00 o'clock, p.m. on July 7, 1921, at its office and station at Chicago, in the State of Illinois, and within the jurisdiction of this court, required and permitted its certain operator and employee, to wit: J. T. Bray, to be and remain on duty for a longer period than nine hours in said twenty-four-hour period, to wit: from said hour of 6.00 o'clock, p.m. on said date, to the hour of 6.00 o'clock a. m. on July 8, 1921.

Plaintiff further alleges that during all the times mentioned herein said office and station was one continuously operated night and day, and that said employee, while required and

permitted to be and remain on duty as aforesaid, by the use of the telegraph or telephone, dispatched, reported, transmitted, received, and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce.

Plaintiff further alleges that by reason of the violation of said Act of Congress, defendant is liable to plaintiff in the sum of five hundred dollars.

6 For a Third Cause of Action plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Illinois.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), defendant, during the twenty-four-hour period beginning at the hour of 6.00 o'clock p. m. on July 8, 1921, at its office and station at Chicago, in the State of Illinois, and within the jurisdiction of this court, required and permitted its certain operator and employee, to wit: J. T. Bray, to be and remain on duty for a longer period than nine hours in said twenty-four-hour period, to wit: from said hour of 6.00 o'clock, p. m. on said date, to the hour of 6.00 o'clock, a. m. on July 9, 1921.

Plaintiff further alleges that during all the times mentioned herein said office and station was one continuously operated night and day, and that said employee, while required and permitted to be and remain on duty as aforesaid, by the use of the telegraph or telephone, dispatched, reported, transmitted, received, and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce.

Plaintiff further alleges that by reason of the violation of said Act of Congress, defendant is liable to plaintiff in the sum of five hundred dollars.

7 For a Fourth Cause of Action plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Illinois.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907

(contained in 34 Statutes at Large, page 1415), defendant, during the twenty-four-hour period beginning at the hour of 6.00 o'clock, a. m. on July 7, 1921, at its office and station at Chicago, in the State of Illinois, and within the jurisdiction of this court, required and permitted its certain operator and employee, to wit: H. F. McCollom, to be and remain on duty for a longer period than nine hours in said twenty-four-hour period, to wit: from said hour of 6.00 o'clock, a. m. on said date, to the hour of 6.00 o'clock, p. m. on said date.

Plaintiff further alleges that during all the times mentioned herein said office and station was one continuously operated night and day, and that said employee, while required and permitted to be and remain on duty as aforesaid, by the use of the telegraph or telephone, dispatched, reported, transmitted, received, and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce.

Plaintiff further alleges that by reason of the violation of said Act of Congress, defendant is liable to plaintiff in the sum of five hundred dollars.

8 For a Fifth Cause of Action plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Illinois.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), defendant, during the twenty-four-hour period beginning at the hour of 6.00 o'clock a. m. on July 8, 1921, at its office and station at Chicago, in the State of Illinois, and within the jurisdiction of this court, required and permitted its certain operator and employee, to wit: H. F. McCollom, to be and remain on duty for a longer period than nine hours in said twenty-four-hour period, to wit: from said hour of 6.00 o'clock, a. m. on said date, to the hour of 6.00 o'clock, p. m. on said date.

Plaintiff further alleges that during all the times mentioned herein said office and station was one continuously operated night and day, and that said employee, while required and permitted to be and remain on duty as aforesaid, by the use of the telegraph or telephone, dispatched, reported, transmitted, received, and delivered orders pertaining to and

affecting the movement of trains engaged in interstate commerce.

Plaintiff further alleges that by reason of the violation of said Act of Congress, defendant is liable to plaintiff in the sum of five hundred dollars.

9 For a Sixth Cause of Action plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Illinois.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), defendant, during the twenty-four-hour period beginning at the hour of 6.00 o'clock, a. m. on July 9, 1921, at its office and station at Chicago, in the State of Illinois, and within the jurisdiction of this court, required and permitted its certain operator and employee, to-wit: H. F. McCollom to be and remain on duty for a longer period than nine hours in said twenty-four-hour period, to-wit: from said hour of 6:00 o'clock p. m. on said date, to the hour of 6:00 o'clock a. m. on said date.

Plaintiff further alleges that during all the times mentioned herein said office and station was one continuously operated night and day, and that said employee, while required and permitted to be and remain on duty as aforesaid, by the use of the telegraph or telephone, dispatched, reported, transmitted, received, and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce.

Plaintiff further alleges that by reason of the violation of said Act of Congress, defendant is liable to plaintiff in the sum of five hundred dollars.

10 Wherefore, plaintiff prays judgment against said defendant in the sum of Three Thousand dollars and its costs herein expended.

CHARLES F. CLYNE,
United States Attorney.

(Endorsed) Filed Dec. 2 1921 John H. R. Jamar Clerk.

11 And on, to wit, the 19th day of December, 1921, came the Defendant, by its attorneys, and filed in the office of the clerk of said court its certain Pleas in words and figures as follows, to wit: Filed 192

12 United States of America
Northern District of Illinois } ss.
Eastern Division

IN THE DISTRICT COURT OF THE UNITED STATES

United States of America
vs.
The Atchison, Topeka & Santa Fe Railway Company } No. 33879

And the Defendant, by Homer W. Davis, R. S. Outlaw and T. F. King, its attorneys, comes and defends the wrong and injury, when, etc., and says that it did not promise in manner and form as the plaintiff has above thereof complained against it; and of this the said defendant puts itself upon the country, etc.

HOMER W. DAVIS,
R. S. OUTLAW,
T. F. KING,
Attorneys for Defendant.

And for a further plea in this behalf the Defendant says that it does not owe the said sum of money above demanded or any part thereof in manner and and form as the plaintiff has above complained against it; and of this the Defendant puts itself upon the country, etc.

HOMER W. DAVIS,
R. S. OUTLAW,
T. F. KING,
Attorneys for Defendant.

(Endorsed) Filed Dec. 19 1921 John H. R. Jamar Clerk.

13 And on, to wit, the 9th day of April, 1924 came the parties, by their attorneys, and filed in the office of the clerk of said court their certain Stipulation Waiving Jury in words and figures as follows, to wit:

14 UNITED STATES OF AMERICA

Northern District of Illinois

Eastern Division.

In the District Court Thereof, April Term, A. D. 1924. } ss.

United States of America, *Plaintiff*
vs.
Atchison, Topeka & Santa Fe Railway Company, *Defendant.* } No. 33879

STIPULATION WAIVING JURY.

It is hereby stipulated by and between the parties hereto by their respective attorneys:

1. That a jury may be and hereby is expressly waived;
2. That this cause may be heard and determined by the Court;
3. That the party against whom the Court may enter judgment may have ten days thereafter to submit to the Court its written request for findings of fact and conclusions of law.

EDWIN A. OLSON,
M. C. LIST,
Attorneys for Plaintiff.
HOMER W. DAVIS,
Attorneys for Defendant.

(Endorsed) Filed Apr. 9 1924 John H. R. Jamar Clerk.

15 And afterwards, to wit, on the 19th day of April, 1924, being one of the days of the regular April term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Adam C. Cliffe, District Judge, appears the following entry, to wit:

16 IN THE UNITED STATES DISTRICT COURT, Hearin Apr.

Northern District of Illinois,

Eastern Division.

Saturday, April 19, A. D. 1924.

Present: Honorable Adam C. Cliffe, District Judge.

United States of America
vs.
The Atchison, Topeka & Santa Fe Railway Company } No. 33879.

This cause having heretofore come on to be heard upon pleadings and evidence adduced, and arguments of counsel, and the Court having considered and being now fully advised in the premises, finds the issues for the plaintiff and assesses the plaintiff's damages against the defendant, The Atchison, Topeka and Santa Fe Railway Company, at the sum of Six Hundred Dollars ($600.00), and thereupon the defendant moves the Court for a new trial, which motion is set down for hearing on May 10th., 1924.

17 And afterwards on, to wit, the 10th day of May, 1924, nunc pro tunc as of April 19, 1924, this matter coming on to be heard, the following order was entered by the Court: Judgm tere 1924

18 IN THE UNITED STATES DISTRICT COURT,

Northern District of Illinois,

Eastern Division.

Saturday, May 10, A. D. 1924.

Present: Honorable Adam C. Cliffe, District Judge.

United States of America
vs.
Atchison, Topeka & Santa Fe Railway Company } No. 33879.

This cause having heretofore been submitted to the Court for trial without a jury and the Court being now fully advised, upon the pleadings and the evidence, finds the issues

for the plaintiff upon six counts of the declaration, which finding is hereby entered nunc pro tunc as of April 19, 1924, and assesses the damages against the defendant at the sum of $600.00. Thereupon the defendant moves the Court for a new trial, which motion is heard and overruled, to which ruling the defendant excepts.

Thereupon the defendant moves the Court in arrest of judgment, which motion is heard and overruled, to which ruling the defendant excepts.

It is therefore considered and adjudged that the plaintiff do have and recover of and from the defendant its damages of $600.00 so as aforesaid found by the Court together with its costs herein to be taxed for which let execution issue. It is further ordered by the Court that the defendant have thirty days in which to file a bill of exceptions.

19 And on to wit: the 16th day of May, 1924, there was filed in the office of the Clerk of said Court the following Bill of Exceptions:

20 IN THE DISTRICT COURT OF THE UNITED STATES,

Northern District of Illinois,

Eastern Division,

United States of America,
Plaintiff.

vs.

The Atchison, Topeka & Santa Fe Railway Company,
Defendant.

No. 33879

BILL OF EXCEPTIONS.

Be it remembered that, heretofore, to wit on the 9th day of April, 1924, the above entitled cause came on for trial at Chicago, Illinois, upon the issues joined herein, before his Honor, Adam C. Cliffe, sitting as a Judge of said Court, without a jury, a jury having been duly waived by the parties by written stipulation in words, and figures, as follows, to wit:

It is hereby stipulated by and between the parties hereto by their respective attorneys:

1. That jury may be and hereby is expressly waived.
2. That this cause may be heard and determined by the Court.

21 Whereupon the parties respectively offered and introduced the following evidence and exhibits of evidence and the following evidence was rejected, and objections and motions were made, and rulings of the Court were entered, and exceptions taken by the parties, all as follows, to wit:

Appearances:

Edwin A. Olson, United States Attorney

Miss Mary D. Bailey, Assistant United States Attorney,

M. C. List, and J. S. Hawley, Special Assistants to the United States Attorney;
Attorneys for Plaintiff;

Homer W. Davis,

John G. Drennan;
Attorneys for Defendant.

And thereupon the plaintiff, to maintain the issues on his part, introduced the following evidence to wit:

Mr. List: I offer in evidence a stipulation as to certain facts, which has been signed by the counsel for the parties hereto and is as follows:

STIPULATION AS TO CERTAIN FACTS.

Now come the plaintiff and the defendant in the above numbered and styled cause by their respective attorneys, and in order to facilitate the trial thereof, stipulate and agree:

1. That the facts with respect to the first three causes of action are the same as the facts in causes of action 4, 5 and 6, and that the judgment of the court may be the same on causes of action 1, 2, and 3, as on causes of action 4, 5, and 6.

22 2. That the following facts may be considered as facts in the case at any trial of causes of action 4, 5, and 6, to have the same weight and effect as if oral testimony or documentary evidence had been introduced to prove the same:

(a) Defendant, The Atchison, Topeka and Santa Fe Railway Company, is a corporation organized and doing business under the laws of the State of Kansas and having an office and place of business at Chicago, Illinois.

(b) As part of its railroad system, defendant maintained during the year 1921, and still so maintains, a certain rail-

road yard, known as Corwith Yard, located within the city limits of Chicago, Illinois, about six miles southwest of defendant's Dearborn Street Passenger Station. All trains moving in or out of Corwith Yard on July 6, 7, 8, and 9, 1921, were engaged in interstate commerce.

(c) During the year 1921 defendant had in its employ at Corwith Yard, among others, two Yardmasters,—J. T. Bray, mentioned in causes of action 1, 2, and 3, and H. T. McCollom, mentioned in causes of action 4, 5, and 6. The regular assigned hours of the former were from 6. p. m. to 6 a. m., and of the latter from 6 a. m. to 6 p. m. During the month of July 1921, Bray and McCollom were required and permitted by defendant to be and remain on duty as such Yardmaster's at Corwith Yard during their regular assigned hours. the same being the hours alleged in plaintiff's declaration or petition.

It Is Further Stipulated And Agreed, that either party hereto may introduce such further relevant and material evidence as it may desire.

24 Whereupon said stipulation was admitted in evidence and marked Government Exhibit 1.

Mr. List: I now offer in evidence, a print prepared by the defendant company, which it is agreed, is correct, showing Corwith Yard and the connections betwen that yard and certain railroad tracks which appear on this print.

Whereupon said print was admitted in evidence, and marked Government's Exhibit 2, and is in words and figures as follows:

H. F. McCOLLOM, called as a witness on behalf of plaintiff, having been first duly sworn, testified as follows:

Direct Examination by Mr. List.

My name is H. F. McCollom. I am and have been for 11 years, yardmaster for the defendant at its Corwith Yard at 38th Street and Central Park Avenue, Chicago. My duties now are practically the same as they were in 1921.

My duties require me to see the cars, have the men place them where they belong, and see that everything is properly handled around the yard. I have general supervision of the Corwith Yard while on duty.

I have no orders to give to road trains. The Dispatcher handles his trains with written orders, which are given to road trains before they start out of the yard.

Corwith Yard extends from 38th Street to 47th Street, the lower part of the yard not being shown on the map, marked Government's Exhibit 2. My office is located at the point designated as Yardmaster's Office on the map.

There are two telephones in my office, one a city phone, and another one is the tower phone to Nerska and Corwith.

The C. & A. main line is double track, and there is a connection between it and the yard, designated on the plat. When C. & A. trains are ready to come into the yard, the Towerman at the Corwith Tower, sometimes calls up the Yardmaster on duty, and sometimes he does not. If the towerman sees the yard is clear, sometimes he gives the C. & A. train the target and lets them into the yard; sometimes he calls up the Yardmaster. The yard would be clear when there was no engine working in the north end of the yard. The practice was for the C. & A. Towerman to call up the Yardmaster.

A Santa Fe train never goes out of the Corwith Yard on the C. & A. main line without first calling up the Corwith Tower, because we have to get permission from the C. & A. before going out on the C. & A. main line.

When a train went out of the Corwith Yard over the east Wye, to the main line of the defendant, it was necessary to get the target, or signal, from the Corwith Towerman, before the train could proceed. I would either call up the Towerman or the Engineer would blow the whistle for the signal.

The object of telephoning the Towerman was to keep from

blocking things at the north end of the yard. We have one lead there to work on.

Trains coming in over the east Wye whistled, while on the main line, to get the target from the Towerman at the Corwith Tower. Sometimes he would then call me or the Yardmaster on duty, to find out if the trains could come into the yard without blocking it, and sometimes he would not.

If he calls me up and I find I can take them into the yard, I say to him, "Let him come."

Trains go from the yard over the west Wye and enter the yard therefrom in the same manner.

At the request of Mr. Anderson of the Interstate Commerce Commission, I made a record of the different movements in and out of the yard, where I used the telephone.

Mr. List: I desire to read the following stipulation of the parties:

(Reading) It is hereby stipulated and agreed by and between the parties hereto:

(a) That at the request of an inspector of the Inter-
27 state Commerce Commission, H. G. McCollom, the Yard-
master of defendant, mentioned in causes of action 4, 5 and 6, made a memorandum of the substance of certain conversations he had over the telephone at Corwith yard on July 7, 8 and 9, 1921, concurrently made with each conversation;

(b) That McCollom's original memorandum has been lost and that in order to expedite the trial of this cause a copy of such memorandum for each of said days may be used by McCollom to refresh his memory, in the same manner as he could use the original memorandum;

(c) That following is a true and correct copy of McCollom's said memorandum for July 7, 8 and 9, 1921.

Mr. List: I ask that I be permitted to hand the witness a copy of the memorandum for the purpose of allowing him to refresh his memory.

Witness: I have a copy.

Mr. List: Now referring to your memorandum. What about the first telephone conversation at 6:29 A. M., July 7th, 1921. What was that?

The Witness: Telegraph operator at Corwith called and said Extra 3173 would be in at 2 p. m. with 27 perishable.

The operator was located at the Corwith freight office, about 400 feet south of the Yardmaster's office. He handled train orders.

The purpose of his calling me up was to give me the con-

sist of what was coming so I would know how to handle my power; whether to send an engine out of the yard or not. That information would help me to expedite the movement of trains in and out of the yard.

Mr. List: Now take the next telephone message at 6:45, July 7, 1921.

The Witness: Called Corwith tower; Local is ready to go west.

28 The object of that was to get the train across the lead tracks at the north end of the yard without blocking anything, and not letting the train pull up to the board until the towerman would give them the signal, which would permit the train to pull out across the C. and A. to the main line of the Santa Fe. That was a local freight train. Under our practice, before I would send a local out, the towerman would advise me over the telephone that it was alright to let it go.

Mr. List: Now referring to the conversation at 10:13 A.M.

The Witness: Reported switching engine 752 to Corwith tower; going to town with 15 cars. The purpose of that conversation was the same as the one at 6:45 A.M.

The conversation at 10:15 A.M. was—I reported switch engine 752 to the Yardmaster at 18th Street. The engine left the yard at 10:15 with 15 cars for 18th Street. The 18th Street Yardmaster's office is about 5 miles from my office. The purpose of that conversation was to let the Yardmaster at 18th Street know that the train was coming so he would be ready to receive it and thus expedite the movement of that train.

Q. Taking the telephone conversation at 10:25 a. m., what was that?

A. Tower called; said extra 3164 from west.

Q. What did you say then?

A. I said, "Let it come."

Q. Did it come?

A. No, it did not come.

Q. What became of it?

A. Corwith tower called back at 10:26.

Q. One minute later. What did they say then?

A. Said he would have to hold extra 3164 for C. & A. No. 1.

Q. What was C. & A. No. 1?

A. A passenger train.

Q. What did you tell Corwith towerman?

A. I said all right.

29 C. & A. No. 2 was a passenger train going south.

At 10:40 A. M. Corwith Tower said, "extra 3164 was ready to come." I said, "let her come." The train came in.

At 11:20 A. M. I reported extra 3185 to Corwith Tower. The towerman said, "Let her come." I guess it went.

At 12:05 P. M. Corwith Tower reported engine 752 from the down-town yard at 18th Street. I said, "Let her come." That train was coming from down-town over the main line of the Santa Fe.

At 1:24 P. M. Corwith Tower reported extra 3173 from the West. I said, "Let her come," and as far as I know it came.

At 1:42 P. M. I called the Corwith Tower and said, "I. & N. was ready to go home." I. & N. meant the Illinois Northern engine which was ready to go north across the C. & A. and Santa Fe main line to the yard of that company at 33d Street.

The towerman said, "All right," meaning he would give the train the target.

I don't hold I. & N. trains at the yard any more, as I don't want them to pull up at the north end of the yard at the lead tracks and block our tracks, while waiting for the target from C. & A. towerman. I do not send I. & N. trains out without first getting permission, or without communicating with the towerman.

At 4:22 the yardmaster at 18th Street called and said, "First 33 had left there with 7 cars for Corwith." He did this so we could get him in the yard. In order to get him in the yard I had to communicate with the towerman at the Corwith Tower.

At 5 P. M. the towerman at the Corwith Tower called and said, No. 24 was at McCook and that he could handle engine 739 to town ahead of No. 24, which was a local passenger train. After he communicated with me he let the engine 30 out of the yard for down-town.

At 6:45 A. M. July 8th, 1921, I called the Corwith Tower, and said "Local is ready to go." The towerman said, "Let her come," and I let her go.

At 7:30 A. M. the telegraph operator at the Corwith Freight Station, called and said that extra 3167 would be at Corwith at 2 P. M. The purpose of that message was to give us the information so we could get ready to take care of the train without delaying traffic.

At 9:12 A. M. I called the Corwith Tower and said, "Engine 752 was ready to leave with 20 cars for town." The towerman said, "Let her come," and I let her go.

At 9:15 A. M. the telegraph operator at the Corwith Freight Station called and said No. 4, the California Limited, a passenger train, would pass Corwith at 10:05 A. M. and that extra 3191 would arrive at about 9:45 A. M., extra 3167 about 2 P. M., and extra 3164 about 5 P. M., and No. 52 about 6 P. M. This information is what is called a line-up. It enabled me to regulate movements in and out of the yard so as not to interrupt the movement of other trains, and also to handle properly, the yard work.

At 9:15 A. M., I called the Yardmaster at 18th Street and told him, engine 752 was leaving the yard with 20 cars. He said, "all right."

At 11:10 A. M. I called the Corwith Tower and said, "No. 39 was ready for the West." He said, "Let her come," and I let her go. That was a local freight train made up in Corwith Yard.

At 11:12 A. M. I called the Corwith Tower, and said, "Had switch engine 2024 going to Nerska," one mile west of Corwith on the main line of the Santa Fe. In going to the main line of the Santa Fe the engine would have to cross the Chicago and Alton main line. The towerman said, "Let her follow up No. 39."

31 At 11:30 A. M. I called the Ash Street Tower and told him to run No. 14 over the I. C. tracks, west from Ash Street, shown on Government Exhibit 2, to the drawbridge, east thereof. The towerman called me up and told me there was a broken rail there, and I made arrangements to get it to Chicago without blocking traffic any more than I could help. The towerman said, "O. K."

At 11:40 A. M., I called the Corwith Tower and said 2062 for town with 5 cars of fruit. He said, "O.K." It was then handled in the same manner as the other trains.

At 11:43 A. M. I called Ash Street Tower and told him to run 2062 over the I. C. from Ash Street Tower and told him to run 2062 over the I. C. from Ash Street to the drawbridge because the Santa Fe track had a broken rail, obstructing traffic. The towerman said he would do that.

At 11:45 A. M. the Corwith Towerman called and said he had switch engine 2024 from the West with one car. I told him to let it into the yard. That was a Santa Fe switch engine. It came in over the West wye across the C. & A. tracks.

At 12:20 P. M., the towerman reported 3167 from the West. I said, "let her come", and she came.

At 12:22 P. M., I called Ash Street tower and told the towerman to let No. 14 down our main track, as it was now O. K.

for use. He said, "O. K." This message countermanded my former message to run No. 14 over the I. C., because before the train got there the track was repaired.

At 1:10 P. M. the Corwith Towerman called and said he had engine 2062 from town. I said, "let her in." That is the same 2062 I let out of the yard at 1:43 with 5 cars. I don't know whether it detoured over the I. C. from Ash Street to the drawbridge, or not.

At 1:55 P. M. I reported C. J., or C. R. & I. engine 234 to the Corwith Towerman and told him it was going home. To go home it had to go out over the Alton crossing on to the Santa Fe main line. He said, "O. K. let them come." I 32 let it go.

At 4:05 P. M. Santa Fe telegraph operator at Corwith called and said, 3178, east at 6:30 P. M., would have 15 loads and one empty, including one perishable. That train was coming to Corwith and the information was for the purpose of expediting the movement of the train into the yard without delaying other trains.

At 4:15 P. M. Corwith Tower called and said he had light engine 234, C. J., to come into the yard. I said, "let her come," and it came. That was the same engine that went out of the yard at 1:55 P. M.

At 4:30 P. M. the yardmaster at 18th Street called me and said first 33 would leave there at 4:30 P. M. with 10 cars, engine 739. I said, "all right." That train was going from 18th Street to Corwith Yard. This message was to enable me to receive it without delaying traffic.

At 4:45 P. M. towerman called and reported first 33, engine 739. I said, "let her come," and she came in. That was the same train that left the 18th Street yard at 4:30 P. M.

At 4:50 P. M., the Corwith Tower reported B. & O. C. T. with 40 cars. That train was making a delivery to our yard. I said to the towerman, "Hold him until we notify you," and it was held.

At 4:53 P. M. I called the Corwith Tower and said "Engine 739 was ready for town." He said, "let them come", and I let them go.

At 5:20 P. M. I called the tower and said, "let B. & O. C. T. in", and the towerman let them in. That was the same train I notified the towerman at 4:50 to hold until I notified him.

At 5:27 P. M. I called the Corwith Tower, and said, "Let B. & O. C. T. engine 2826 out." He said, "O. K.", and it went. This was the same engine that hauled the cars in shortly before.

Mr. List: Now Mr. Davis, I think we can save a little
33 time, if you are willing to agree with me that the work of Mr. McCollom on July 9 was substantially the same as on the two preceding days. It will save going over these messages.

Mr. Davis: I shall be glad to do that with the single exception that there was not any conversation with any Towerman on July 9th, concerning the detouring of trains on account of a broken rail or other track obstructions.

Mr. List: Well, so far as the regular conversations with these other towers are concerned, it was substantially the same as on July 7th, and 8th.

Mr. Davis: That is correct.

Mr. List: I offer in evidence, Rules 7 and 8 of the Chicago Terminal Time-Table of the Defendant company, in force on July 7th, 8th, and 9th, 1921, reading as follows:

(Reading Rule 7): "On double tracks, when one track becomes obstructed from any cause, the following arrangement will govern until both tracks are ready for service, unless contrary instructions are given by proper authority. The Terminal Trainmaster, or in his absence the Yardmaster on duty at Corwith, will immediately arrange to run trains on the wrong track between the nearest cross-over switches each side of the obstructions in the following manner: He will assign one switch crew to act as pilot and switch tenders. The foreman, who will act as pilot, will handle all trains passing over the clear tracks in both directions between the cross-overs mentioned above. The foreman of this crew will place one of his helpers at each of the cross-over switches, who must not allow any trains to use the clear track unless the foreman is on hand and gives the train written order on slip of paper addressed to that particular train and reading as follows: "Use east (or west) track to first cross-over beyond obstruction," and sign his name as pilot. When the helpers cannot safely signal trains to stop for the switches, switch tenders should be sent from the yard and stationed 2,000 feet
34 outside of each cross-over switch to notify trains not to pass clearance point at these switches without orders from the pilot in charge as above. The foreman acting as pilot will use his engine to run from one cross-over to the other if necessary. All trains are authorized to use the wrong track as per the above arrangements.

Rule 8. All extra or delayed regular trains will keep sharp look-out for switch engines and work west of the west end of Belt siding, also at all points within switching limits of Chi-

cago terminals, which extend to yard limit board, 4,950 west of Nerska.

Said rules were thereupon admitted and received in evidence.

Mr. List: I offer Rules 521 and 522 of the Book of Rules of the Operating Department of the Defendant company, in effect during July 19th, 1921, as follows:

Rule 521. At stations where a yard force is employed, all trains or engines without trains will be under the control of the Yardmaster, and all employes in train or engines will be subject to his instructions. Road crews of trains entering such stations will be responsible for their respective trains or engines until the same are taken in charge by the yardmaster or his representative.

Rule 522. Yardmasters are under the direction of the train master or agent. They will have charge of the yard at stations where trains are made up, the movement of trains therein and of the entire yard force. They are responsible for the prompt movement of cars, the proper position of the switches, and the expeditious dispatch of trains within the limits of the yards.

Said rules were thereupon admitted and received in evidence.

35 *Cross-Examination by Mr. Dranman.*

My official position is Yardmaster, and in July 1921, I had an assistant, whose title was Assistant Yardmaster. No through trains from the City of Chicago pass through that yard and no passenger trains go through. When I was in the office the Assistant Yardmaster took my place in the yard, and when I was out in the yard, he took my place in the office. I was in the office between one-half to two-thirds of the time.

The greater part of the telephoning I do is on commercial business. People call up and make inquiry as to whether their cars are in the yard or what has been done with them.

The Terminal Trainmaster is my boss. His name is I. C. Brown.

At the station in the yard, 400 or 500 feet south of my shanty, or office, are located the Superintendent of Terminals, the Trainmaster, the Telegraph Operator, the Agent, and the Agent's employes. I perform no duties in regard to that station.

The Corwith Towerman was under the jurisdiction of the Chicago and Alton. He was not under my jurisdiction or sub-

ject to my orders. When I wanted to get a train out of the yard lively or something like that, I would call him up. As to whether he would let the train out or not was a matter for him to determine.

If a train approaching the interlocking plant wanted to go east, it would whistle twice, and if it wanted to go west it would whistle three times. The Towerman then determined whether the board should be given or not. I had no control or power over him to tell him to give them the board or not to give them the board.

In the movements of the trains in the yard over which
36 I had jurisdiction I did not give any orders on the days in question by telephone to any train crews.

At 12:20 P. M., July 8th, 1921, when the Towerman reported 3167 from the West, and I said, "let her come" I meant I could take the train in and not hold it on the crossing.

Whether he would let the train in or not depended on his judgment and not mine, except that I had room for it.

Mr. Drennan: Q. Now, under whose directions and orders would he let them in after you had given the information that there was room for it?

A. His own.

Q. If he had concluded not to let it in in his judgment would you consider that he had violated any orders, so far as you were concerned?

A. No, sir.

Mr. Drennan: It is merely a matter of information, if the Court please.

The Court: I understand. That is all right.

Mr. Drennan: Q. And is that true of all of the other memorandums which you made and of which the government has asked you about?

A. Yes, sir.

Mr. Drennan: Q. In order for the Court to comprehend it. I want you to tell the Court briefly, in your own way, a sample of what you and your assistant do there each day so far as it is a sample of what you did on this day. Just tell him in your own way.

A. Of everything?

Q. Yes, from the time you get there in the morning. Do you get there at 6 o'clock?

A. We get there at 6 o'clock in the morning, look over the yard reports—"turn over", as they call them, from one man to the other. My assistant gets there at 7 o'clock.

37 He looks them over and he goes out and checks in the yard.

Q. Tell the Court what that means.

A. He gets a check of all the cars.

Q. Takes the numbers of all the cars?

A. No, he takes a check of the yard and comes back in and reports it to the trainmaster's office upstairs. I most generally go out then and look around the yard and see that things are right. I look for stragglers or cars going astray and the likes of that, cars without loads, laying around, and looking after the engines. Well, I come back maybe in half an hour, maybe two hours or three hours. Maybe I will be gone only half an hour. I would come back and he would go out and handle his engines around again. He would tend to breaking up and making up trains. That is about all there is to it.

Q. Now, what particular class of work is under your jurisdiction there in that yard where you have the say-so?

A. Well, making up and breaking up of trains.

Q. And if you are in the office, that is his duty, your assistant's duty?

A. Yes, sir.

Mr. Davis: Q: Now, referring to the telephone conversation with the Towerman at Ash Street, I believe you stated on direct examination that came up on account of a broken rail.

A. I think that was the cause of it.

Q. And that obstructed the line?

A. Yes, sir.

Q. And as I understand it in case of that kind you take charge and handle matters under the rules, is that correct?

A. Yes.

Q. That is under an emergency?

A. Yes.

Q. Do they arise very often?

A. Oh, no; hardly ever.

The switch-tenders stay at or near my office. I give them their instructions verbally.

38 On July 7th, at 1:42 P. M., when I had a conversation with the Corwith Towerman about an Illinois Northern train, it was on a track about 50 feet from my office. Between where it was standing and the tower, there are switches under the control of the switch-tenders. If the Illinois Northern engine went up close to the tower on the lead, it would stop us from switching. I did not want the train to go up

there until I was sure the operator would let it go out of the yard.

Trains coming into the yard have all the way from one car to a hundred cars. A train of 100 cars would be about a mile long—just the full length of the yard and would require a clear track for the entire length of the yard to pull it on. Otherwise it would block the C. & A. crossing.

We use the lead tracks at the north end of the yard for switching purposes. We run back and forth there all day long, except when a train is coming into or going out of the yard. Then we must keep it clear.

When we get information that a train is ready to come into the yard, we get our switch engines off the lead track at the north end of the yard.

On the day when the B. & O. C. T. train came up and the Towerman told me it wanted to come into the yard, and I said to "hold it off", the reason for that was, we were so full we could not handle it at that time.

The Towerman could have let the train come into the yard if he had wanted to without any danger to the train. It would have been stopped by the switches at the north end of the yard, but it would have blocked the C. & A. traffic. The effect of my statement was that if the train came in and it could not get by the switches, it would have blocked the C. & A. crossing. There was no room for it.

Road trains get written orders from the telegraph operator at the freight station. When they get their orders they are ready to go. I generally call up the towerman when they 39 whistle. If he says he cannot let them out, I don't let them start. I go out and give them a hand sign to stay where they are.

Some engineers would pull up to the board if it was set for them to stop and tie up the north end of the yard. The Towerman might hold them there 30 minutes, during which time we could not work. The reason I find out whether the Towerman can let them go by, is so that I can keep them from pulling up to the north end of the yard and blocking the tracks.

In regard to the message to the Ash Street Towerman, if I am not mistaken, the Towerman called me up and told me about the rail. That was an emergency and happens very seldom. I took charge of the situation under the rule.

The Trainmaster during the days in question, never gave me any orders for the operation of trains and I did not receive any orders by telegraph or telephone.

Redirect Examination by Mr. List.

The Towerman at the Corwith Tower was a joint employe of the Santa Fe and Alton.

The Towerman could have let the B. & O. C. T. train in without orders from me, but he would have tied up the C. & A. Railroad. I told him to hold the train, and he held it. Later on, I told him to let it in and he let it in.

During the time I was not in the shanty, my assistant was on duty and he probably had similar conversations to those I had.

Q. Now what was the difference in effect between the yardmaster or the Corwith Towerman calling you up and saying that a train was ready and you replying to him to let her come, and a report that you would send him that a train was ready to go out and he would say, "All right." What was the difference between those two messages, so far as their effect upon the movement of the train was concerned?

A. There wasn't any, I should say.

40 The orders given by the telegraph operator to the train crews of road trains give them the right to go out of the yard over the C. & A. crossing, but they cannot do that until the Towerman gives them the signal, and they cannot go out of the yard if I tell them to stay where they are, but if I don't do anything, and the Towerman gives them the signal, then they can go out.

Recross Examination.

I am under general instructions to let all trains in or out of the yard. I do not need any instructions from the Towerman to let trains out of the yard.

Redirect Examination.

I don't give train crews any orders by 'phone or by telegraph. They are all verbal.

Recross Examination.

If an engineer whistles and gets the targets, the switchtender will set the switches. I don't have to do anything about it.

Whereupon the defendant at the close of plaintiff's testimony, and plaintiff having rested, moved the Court to ex-

clude the evidence offered by and on behalf of the plaintiff and to find the issue for the defendant on the ground that, under the pleadings, the evidence, and the law of the case, the plaintiff was not entitled to recovery.

The Court overruled said motion, to which ruling of the Court, the defendant, by its counsel, then and there duly excepted.

And thereupon the defendant, to maintain the issues on its part, introduced and offered the following evidence:

H. L. HAUSHALTER called as a witness on behalf of the defendant, having been first duly and regularly sworn, was examined in chief by Mr. Drennan and testified as follows:

I am, and on July 7, 8 and 9, 1921, was operator and
41 leverman in the Corwith Tower. I am, and was, under the Superintendent of Terminals of the Chicago and Alton Railroad Company.

The man I have the most conversation with is the Yardmaster. There are times when I think he gives me orders but probably it is only information. After I get information from the Yardmaster, or any source that may be available, I act on my own judgment as to whether I shall give the engineer the board or not.

Direct Examination by Mr. Davis.

Q. Mr. Haushalter, under the rules and practices you are supposed to let trains pull over your plant that come up there and give the proper signals, are you not?

A. Yes, sir.

If the Santa Fe Yardmaster tells me to let a train come ahead, I do not always do it, on account of the fact that it might cause delays to other trains. I find out about the movement of trains from the Train Dispatcher, the Yardmaster, and from Towerman on either side of me. I work for both companies.

Cross-Examination by Mr. List.

Q. Now, it appears here that there are several different kinds of messages. For instance, it appears that you called up and said a certain train was ready to come in and he said "Let her come." Then it appears that the next minute you

called up and said you were going to hold that train until a certain other train had passed. Just state what would cause a change in your plans?

A. Well, it was probably the speed that I could see that freight was traveling at, or maybe information I gathered a minute or two later regarding the length of it, that I was afraid of giving him the chance of coming across the
42 C. & A. crossing for fear he would delay a first class train.

Q. Take this B. & O. C. T. train; I will call your particular attention to it. Mr. McCollom said you reported B. & O. C. T. train with 40 cars, and that he told you, he said, "Hold him there till I notify you." Did you consider that an order to hold that train, or did you think you could send it in regardless of what Mr. McCollom told you?

A. Well, in a way it was like an order.

Q. Yes.

A. But I guess I had the option of using my own judgment on that order.

I have never let a train go into the yard when the yardmaster told me to hold it. I always let them go in when he tells me to let them come if I can do so without delaying a superior train. The yardmaster does not always call me up when trains go out of the yard. I get the whistle signals and I give them the board.

I do not always call up the yardmaster when a train is going into the yard. It depends on whether there is a C. & A. train due soon. If there is plenty of time I just let the trains in on him. He had information they were coming and he was responsible for taking care of them. They could not go on into the yard if the switches were against them. I do not have anything to do with the yard switches.

The telephone messages were for the purpose of expediting the movement of these trains and not for the purpose of finding out what was the condition of the switches leading into the yard.

The telephone was used in a large majority of cases.

CHARLES A. GORDON, called as a witness on behalf of the defendant, having been first duly and regularly sworn, testified as follows:

43 I am Assistant Superintendent of Terminals for the Defendant. My office is at Corwith, in the station build-

ing about 150 yards from the yardmaster's shanty. I was yardmaster from 1907 to 1910, at Corwith. Assistant General Yardmaster and General Yardmaster from 1910 to 1918; Terminal Trainmaster from 1918 to 1920, and from that date
44 to the present time, Assistant Superintendent of Terminals.

The duties of the yardmaster, are to supervise all of the switching that comes within his jurisdiction, regardless of whether it is freight house work, shop work, making up, or breaking up, or delivering trains.

All orders given for the movement of cars, trains or engines in the yard, are given orally to the foreman who has charge of the various engines, or perhaps the switch tender or assistant Yardmaster.

The rules require that a train entering the yard must be absolutely under control and prepared to stop within range of vision.

The Yardmaster has no jurisdiction over the Towerman, or the Towerman over the Yardmaster. I do not have any jurisdiction over the Towerman myself. The talk between them is information in order that each may perform his duties in connection with existing rules.

Mr. Davis: May it please the Court: With the concurrence of counsel for the government, I desire to introduce in evidence Rule No. 8 contained in Government's Exhibit No. 3, which reads as follows:

"Whistle signals for interlocking systems.

"8. Trains leaving Corwith yard, one whistle for Illinois Northern Railroad, two whistles, for east Wye, three whistles for west Wye.

Trains on eastbound main tracks: One whistle for going through, two whistles for Corwith yard.

Trains on westbound main track: One whistle for through, two whistles for Corwith yard.

Trains going south on Illinois Northern Railway; One whistle for Corwith yard.

Trains going east on westbound main track: Three whistles: To Corwith Yard, four whistles.

Trains going west on eastbound main track: Three
45 whistles for going through; four whistles for Corwith yard."

I would also state the Illinois Northern Railway, which is referred to in the time table and which has been spoken of in the testimony, is the railway shown on the plat as the 26th Street line.

The Court: I guess there is no question about that.
Mr. List: No.

CHARLES A. GORDON recalled for further redirect examination by Mr. Drennan:

If the telephone was taken out of the Yardmaster's office, the business would go right on. I went to work in the north end of the Corwith Yard in 1894. They had no telephone connections with the tower at that time. Trains operated in and out of the yard on whistle signals as laid down in the Terminal Time-Card, just as they are now. They have never been changed. The telephone is simply a matter of convenience.

The interlocking plant is a different kind of a plant now than it was years ago. In those days it was an old hand-lever plant, and now it is a modern electric plant.

Recross Examination by Mr. List.

There were not so many cars handled in and out of Corwith Yard in 1894 as there are today, but there were more trains because the power is heavier today and hauls longer trains.

Mr. Drennan: The Transportation Act authorizes the Interstate Commerce Commission to designate officials of railroads under certain classes. We have here a copy of the order of the Interstate Commerce Commission in effect July 7, 8, and 9, 1921, designating Yardmasters as subordinate officials.

Mr. List: That will be admitted but I would like to
46 have it also understood that in the same order the Commission has designated Train Dispatchers as subordinate officers.

GEORGE H. MINCHIN, called as witness on behalf of the defendant, testified as follows:

I am Division Superintendent of the Division located at Chicago, Illinois. Corwith Yard and the Chicago Terminals are in my jurisdiction.

The Chicago and Alton operates the interlocking plant at the entrance to Corwith Yard. The Terminal Trainmaster

is the boss of the Yardmaster. The C. & A. has no control over the Yardmaster. The Yardmaster has no authority to give orders to the Towerman. They do give one another information and then each acts for his own road.

Cross-Examination by Mr. List.

The Towerman is really a joint employe but is paid by the C. & A.

The orders given by the Dispatcher govern the operation of a train from the point in the yard where they are received to final destination. Those orders are written orders.

Q. Well, take the time where the B. & O. C. T. train was coming into the Corwith yard, and the Towerman at Corwith yard called up Mr. McCollom and told him he was ready to send that train in, and Mr. McCollom told him to hold that train; what would you call that?

A. I would call that information.

Q. Then, you understand that when Mr. McCollom told the towerman to hold that train, that towerman would have a right to send that train in regardless of what Mr. McCollom said?

A. Yes, sir.

Redirect Examination by Mr. Davis.

Q. Well, have or haven't towermen general instruc-
47 tions as to not sending a train into the yard that cannot receive it?

A. General instructions provide that before they can make a move of that kind they must ascertain that it is not going to tie up the railroad and be governed then accordingly.

Q. As far as safety goes, the train could go in there?

A. As far as safety goes, that doesn't enter into it. It is simply a matter of not blocking up the yard.

Mr. Drennan: Q. But if a towerman can see that the yard is open and safe, he does not need to ask anybody, does he?

A. No.

Mr. Davis: Q. But if he found out the train could not be received and he sent the train in, he would be called down?

A. As far as our yard is concerned, it does not make any difference; but I imagine the C. & A. would tell him he did a poor job because he would block their traffic.

There are three telephones in the yardmaster's office. One telephone is between the yardmaster's office and the towerman; the yardmaster is on one end and the towerman on the other.

Mr. Davis: I desire to state some facts which I understand Mr. List admits, subject to his objection as to materiality and relevancy.

Mr. List: There are other reasons too which I will state afterwards.

Mr. Davis: The facts are that the question of working 12 hours or 8 hours was submittd to a vote of the yardmasters on the lines of The Atchison, Topeka and Santa Fe Railway System, which extends from Chicago to California and Texas. The Coast Lines of the system are from Albuquerque west.

The Court: Albuquerque, New Mexico?

Mr. Davis: Albuquerque, New Mexico; west to California. The Vote on the Coast Lines was in favor of eight hours, and the yardmasters there work eight hours. On
48 all the balance of the system the vote was in favor of twelve hours, and they now work twelve hours there, in accordance with that vote.

Mr. List: I will have to object to that offer, if the Court please, because it is wholly immaterial and irrelevant how long these men were to work. I also object to it on the further ground that he has not made it appear that these men voted without being influenced by some threat of having their salary or wages reduced if they had to work eight hours instead of twelve. It does not appear whether their vote was of their own free choice or brought about by the situation that there would be a reduction in wages. The immateriality of it is the important thing.

Mr. Davis: Well, I might say further that the proposition connected with it was that if they were to work eight hours, there was to be a reduction of $8.63 a month. If they continued to work twelve hours there was to be an increase of $20.00 per month.

Mr. List: Well, I will accept your statement, but I will still object to the materiality.

The Court: The objection is sustained.

To which ruling of the Court, the defendant by its counsel, then and there duly excepted.

Whereupon the defendant rested its case.

The foregoing was all the evidence offered, heard, or ad-

mitted by either side in this case. Thereupon the plaintiff moved for judgment in its favor on each of the six causes of action.

Whereupon the defendant moved the Court to find and hold that the defendant had not violated the Act of Congress of March 4, 1907, contained in 34 Statutes at Large, page 1415, as alleged in the declaration and to find the issues for the defendant and to enter judgment in favor of defendant for the following reasons:

49 That there is no substantial evidence to support the allegations of the declaration in this case and that under the pleadings, the evidence, and the law of the case, the plaintiff is not entitled to recover.

And thereupon, the Court took the case under advisement.

And thereafter on the 19th day of April 1923, the Court overruled defendant's motion for finding and judgment in its favor and found and held that the defendant had violated the Act of Congress of March 4th, 1907, (contained in 34 Statutes at Large, page 1415) as alleged in the declaration and was liable to plaintiff in the sum of six hundred Dollars, to which ruling of the Court, defendant, by its counsel, then and there duly excepted.

Whereupon the defendant moved the Court to set aside said finding and grant a new trial herein, which motion the Court denied, to which ruling of the Court the defendant by its counsel then and there duly excepted.

And thereupon on the same day the defendant entered its motion in arrest of judgment upon the ground that under the pleadings, the evidence and the law of the case, the plaintiff was not entitled to recover, which motion on May 10, 1924, was overruled by the Court, and the Court, over the objection and exception of defendant, entered judgment upon said finding in favor of the plaintiff, to which ruling of the Court the defendant by its counsel then and there duly excepted.

And thereupon on said 19th day of April 1924, the Court entered an order allowing said defendant until the 19th day of May 1924 to present and file its Bill of Exceptions in said cause.

And at the trial of said cause such proceedings were had, and such objections to evidence, and such offers of evi-
50 dence and such motions, and such requests for instructions, and such refusal of instructions requested, and such instructions were given, and such rulings by the Court were made, and such exceptions were taken and saved, at the

respective times of the several rulings and actions excepted to, as herein indicated in the foregoing pages.

Forasmuch as the matters and things above set forth do not fully appear of record the said defendant, The Atchison, Topeka and Santa Fe Railway Company tenders and presents the foregoing as its Bill of Exceptions in said cause and prays that the same may be settled, allowed and signed and sealed and made a part of the record in said cause by this Honorable Court pursuant to the law in such cases.

Which is accordingly done and ordered by the Court on this 10th day of May, A. D. 1924.

ADAM C. CLIFFE,
Judge.

O. K.
M. C. List.
H. W. DAVIS.
EDWIN A. OLSON.

(Endorsed) Filed May 16, 1924, John H. R. Jamar, Clerk

51 (Endorsed) No. 33879 In the Dist. Ct. of the U. S. Northern Dist. of Ill. Eastern Division. United States of America, Plaintiff, v. The AT&SFRYCO., Defendant. Bill of Exceptions. Filed May 16 1924 at .....O'Clock.....M. John H. R. Jamar Clerk. Homer W. Davis John G. Drennan Attorneys for Defendant.

56 And on, to-wit, the 10th day of July, 1924, came the Defendant, by its attorneys and filed in the office of the clerk of said court its certain Petition for Writ of Error in words and figures as follows, to-wit:

57 IN THE DISTRICT COURT OF THE UNITED STATES, Filed Jul 1924.

Northern District of Illinois,

Eastern Division.

United States of America,
Plaintiff,
vs.
The Atchison, Topeka and Santa Fe Railway Company,
Defendant.
No. 33879.

PETITION FOR WRIT OF ERROR

The Atchison, Topeka and Santa Fe Railway Company, defendant in the above entitled cause, feeling itself aggrieved by the verdict of the court and the judgment entered on the 19th day of April, 1924, comes now by Homer W. Davis, Emmet Trainor and Thomas F. King, its attorneys, and petitions said court for an order allowing said defendant to prosecute a Writ of Error to the honorable United States Circuit Court of Appeals for the Seventh Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this Court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals.

58 And your petitioner will ever pray.

HOMER W. DAVIS,
EMMET TRAINOR,
THOMAS F. KING,
Attorneys for Defendant.

(Endorsed) Filed Jul 10 1924 John H. R. Jamar Clerk.

59 (Endorsed) Copy No. 33879 In the Dist. Ct. of the U. S. Northern Dist. of Ill. Eastern Division United States of America, Plaintiff, v. The Atchison, Topeka and Santa Fe Ry. Co., Defendant. Petition for Writ of Error Homer W. Davis Emmet Trainor Thomas F. King Attorneys for Defendant 1011 Railway Exchange Ha. 4900 Filed Jul 10 1924 At.....O'Clock.....M. John H. R. Jamar Clerk.

10. 52 And on, to-wit, the 10th day of July, 1924, came Defendant, by its attorneys, and filed in the office of the clerk of said court its certain Assignment of Errors in words and figures as follows, to-wit:

53 IN THE DISTRICT COURT OF THE UNITED STATES,

Northern District of Illinois,

Eastern Division.

United States of America,
Plaintiff,
vs.
The Atchison, Topeka and Santa Fe Railway Company,
Defendant.
No. 33879.

ASSIGNMENT OF ERRORS

And now comes the defendant, The Atchison, Topeka and Santa Fe Railway Company, a corporation of the state of Kansas, by Homer W. Davis, Emmet Trainor and Thomas F. King, its attorneys, and in connection with its petition for a writ of error herein says that in the record and proceedings and during the trial of the above entitled cause and in the said judgment in the said District Court error has intervened to its prejudice, and this defendant here makes the following Assignment of Errors upon which it will rely in the prosecution of the writ of error in the above entitled cause, to-wit:

1. The District Court erred in overruling and denying the motion of the defendant made at the close of all the evidence to find and hold that there was no substantial evidence to support the allegations of the declaration.

2. The District Court erred in refusing to find and hold that under the pleadings, the evidence and the law of the
54 case plaintiff was not entitled to recover.

3. The District Court erred in finding and holding, over defendant's objection and exception, that the defendant had violated the Act of Congress of March 4, 1907, (contained in 34 Statutes at Large, page 1415) as alleged in the declaration and was liable to plaintiff in the sum of $600.00.

4. The District Court erred in refusing to find the issues for the defendant.

5. The District Court erred in refusing to enter judgment in favor of defendant.

6. The District Court erred in entering judgment against defendant.

Wherefore said The Atchison, Topeka and Santa Fe Railway Company, by reason of the errors aforesaid, prays that said judgment and fine against it, the said The Atchison, Topeka and Santa Fe Railway Company. may be reversed, set aside and held for naught.

HOMER W. DAVIS,
EMMET TRAINOR,
THOMAS F. KING,
Attorneys for Defendant, The Atchison, Topeka and Santa Fe Railway Company.

(Endorsed) Filed Jul 10 1924 John H. R. Jamar Clerk.

55 (Endorsed) No. 33879 In the Dist. Ct. of the U. S. Northern Dist. of Ill. Eastern Division United States of America, Plaintiff, v. The AT&SFRYCO., Defendant. Assignment of Error Homer W. Davis Emmet Trainor Thomas F. King Attorneys for Defendant 1011 Railway Exchange Harr. 4900 Filed Jul 10 1924 at.....O'Clock.....M. John H. R. Jamar Clerk.

62 And afterwards on, to wit, the 10th day of July, 1924, this matter coming on to be heard, the following order was entered by the Court:

63 IN THE DISTRICT COURT OF THE UNITED STATES,

Northern District of Illinois,

Eastern Division.

Thursday, July 10, A. D., 1924.

Present: Honorable Adam C. Cliffe, District Judge.

United States of America,
Plaintiff,
vs.
The Atchison, Topeka and Santa Fe Railway Company,
Defendant.
No. 33879

ORDER

Upon motion of Homer W. Davis, Emmet Trainor and Thomas F. King, Attorneys for Defendant, and upon filing a petition for a Writ of Error and Bond on said Writ of Error in the sum of One Thousand (1000) Dollars and an Assignment of Errors, it is ordered that a Writ of Error be and the same hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Seventh Circuit the judgment heretofore entered herein; and it is further ordered that all further proceedings in this court be and they are hereby suspended and stayed until the determination of said Writ of Error by the said United States Circuit Court of Appeals for the Seventh Circuit.

Entered:

ADAM C. CLIFFE,
Judge.

64 (Endorsed) Copy No. 33879 In the Dist. Ct. of the U. S. Northern Dist. of Ill. Eastern Division. United States of America, Plaintiff, v. The AT&SFRYCO., Defendant. Order Homer W. Davis Emmet Trainor Thomas F. King Attorneys for Defendant 1011 Railway Exchange Harr. 4900

65 United States of America, } ss.

Filed Ju 1924.

The President of the United States, To the Honorable the Judges of the District Court of the United States, for the Northern District of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between United States of America and The Atchison, Topeka and Santa Fe Railway Company, (being cause No. 33879) a manifest error hath happened, to the great damage of the said The Atchison, Topeka and Santa Fe Railway Company as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals For The Seventh Circuit, together with this writ, so that you have the same in the United States Circuit Court of Appeals for the Seventh Circuit at Chicago, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals for the Seventh Circuit may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the 10th day of July, in the year of our Lord one thousand nine hundred and twenty four.

JOHN H. R. JAMAR,

(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

Allowed by

ADAM C. CLIFFE

Northern District of Illinois, } ss.

In obedience to the within writ, I herewith transmit to the United States Circuit Court of Appeals for the Seventh Circuit, a true and complete transcript of the record and proceedings in the foregoing entitled cause this 17th day of July, A. D. 1924.

JOHN H. R. JAMAR,
(Seal) *Clerk of the United States District Court,*
Northern District of Illinois.

(Endorsed) United States Circuit Court of Appeals Seventh Circuit The AT&SFRYCO., Plaintiff in Error vs. United States of America, Defendant in Error Writ of Error Homer W. Davis Emmet Trainor Thomas F. King Attorneys for Plaintiff in Error. Harr. 4900 Copy deposited for the defendant in error in the Clerk's office of the U. S. Dist. Court for the Northern District of Illinois Filed Jul 10 1924 At.....O'Clock.....M. John H. R. Jamar Clerk.

60 And on, to wit, the 10th day of July, 1924, came The
1924. Atchison, Topeka and Santa Fe Railway Company as principal, and Michael J. Collins as surety, and filed in the office of the Clerk of said Court a certain Bond on Writ of Error in words and figures following, to wit:

61 Know All Men by these Presents, That we, The Atchison, Topeka and Santa Fe Railway Company, as principal, and Michael J. Collins, as surety, are held and firmly bound unto United States of America in the full and just sum of One Thousand Dollars ($1,000.00) to be paid to the said United States of America its certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated this.....day of June in the year of our Lord one thousand nine hundred and twenty-four.

Whereas, lately at a session of the District Court of the United States for the Northern District of Illinois, Eastern Division in a suit pending in said Court, between United

States of America plaintiff, and The Atchison, Topeka and Santa Fe Railway Company defendant, a judgment was rendered against the said defendant and the said defendant having obtained from said Court a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said United States of America citing and admonishing it to be and appear at the United States Circuit Court of Appeals for the Seventh Circuit, to be holden at Chicago within thirty days from the date hereof.

Now, the condition of the above obligation is such, That if the said The Atchison, Topeka and Santa Fe Railway Company shall prosecute its writ to effect and shall answer all damages and costs that may be awarded against it if it fails to make its plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

THE ATCHISON, TOPEKA AND SANTE FE RAILWAY COMPANY,
By E. J. ENGEL (Seal)
Its Vice President,
MICHAEL J. COLLINS (Seal)

Attest:
EDWARD MCBRIDE
(Seal) *Assistant Secretary*

Approved by—
ADAM C. CLIFFE

O. K. EDWIN A. OLSON
United States Atty.
M. D. B.

(Endorsed) Filed Jul 10 1924 John H. R. Jamar Clerk

10. 66 IN THE DISTRICT COURT OF THE UNITED STATES,

Northern District of Illinois,

Eastern Division.

United States of America, *Plaintiff,*
vs.
The Atchison, Topeka and Sante Fe Railway Company, *Defendant.* } No. 33879

PRAECIPE FOR TRANSCRIPT OF RECORD

To the Clerk of the above entitled Court:

You will please prepare a Transcript of the Record in the above entitled cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Seventh Judicial Circuit, under the Writ of Error heretofore allowed by said Court, in accordance with the attached stipulation of the parties to said cause.

HOMER W. DAVIS,
Attorney for Plaintiff in Error The Atchison, Topeka and Santa Fe Railway Company.

Received a copy hereof this 10th day of July, 1924.
EDWIN A. OLSON, *United States Attorney,*
Attorney for Defendant in Error.
M. D. B.

67 IN THE DISTRICT COURT OF THE UNITED STATES,

Northern District of Illinois,

Eastern Division.

United States of America, *Plaintiff,*
vs.
The Atchison, Topeka and Sante Fe Railway Company, *Defendant.* } No. 33879

STIPULATION FOR PRAECIPE.

It is hereby stipulated by and between the parties hereto that the Clerk of the Court in preparing a transcript of the

record in the above entitled cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals of the Seventh Circuit, may include in the said transcript the following papers:

Declaration filed December 2d, 1921.
Pleas of the defendant filed December 19th, 1921.
Stipulation waiving jury filed April 9th, 1924.
Judgment entry of April 19th, 1924.
Motion for new trial and order denying same.
Motion in arrest of judgment and order denying same.
Order allowing thirty days for bill of exceptions.
Bill of exceptions filed May 16, 1924.
Assignment of Error.
Petition for writ of error.
Order allowing writ of error.
Writ of error.
Supersedeas Bond.
Citation.
Clerk's return to writ of error.
Copy of this stipulation.

EDWIN A. OLSON,
United States Attorney
Attorneys for Plaintiff
M. D. B.
HOMER W. DAVIS
Attorneys for Defendant
The Atchison, Topeka and Santa Fe Railway Company

(Endorsed) Filed Jul 10-1924 John H. R. Jamar Clerk.

68 (Endorsed) No. 33879. In the Dist. Ct. of the U. S. Northern Dist. of Ill. Eastern Division United States of America, Plaintiff, vs. The AT&SFRyCo., Defendant. Praecipe of Transcript of Record Homer W. Davis Emmet Trainor Thomas F. King Attorneys for Defendant 1011 Railway Exchange Harr. 4900.

69 Northern District of Illinois, } ss.
Eastern Division, }

I, John H. R. Jamar, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with Praecipe filed in this Court in the cause entitled United States of America vs. The Atchison, Topeka and Santa Fe Railway Company, No. 33879, as the same appear from the original records and files thereof, now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in the City of Chicago, in said District, this 17th day of July, A. D. 1924.

(Seal)

JOHN H. R. JAMAR,
Clerk.

70 United States of America, } ss.

Filed Jul 1924.

The President of the United States, To United States of America, Edwin A. Olson, Attorney, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Seventh Circuit, to be holden at Chicago, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's Office of the District Court of the United States for the Northern District of Illinois, Eastern Division, wherein The Atchison, Topeka and Santa Fe Railway Company is plaintiff in error and you are defendant in error to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Adam Cliffe, Judge of the District Court of the United States, this ..... day of June, in the year of our Lord one thousand nine hundred and twenty four.

ADAM C. CLIFFE,
District Judge.

Received a copy of the within and foregoing citation this 10th day of July, 1924.

EDWIN A. OLSON,
United States Attorney.
Attorney for defendant in error.
M. D. B.

(Endorsed) No. 33879 District Court of the United States, Northern District of Illinois, Eastern Division, The AT&SF RyCo., Plaintiff in error, vs. United States of America, Defendant in error. Citation. Returnable ..... 19..... ....., Clerk. Homer W. Davis, Emmet Trainor Thomas F. King Attorneys for Plaintiff in Error. Harr. 4900 Filed Jul 10 1924 at ..... o'clock .....M. John H. R. Jamar, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 45, inclusive, contain a true copy of the printed record, printed under my supervision and filed August 13, 1924, on which the following entitled cause was heard and determined:

The Atchison, Topeka and Santa Fe Railway Company

vs.

The United States of America

No. 3475, October Term, 1923, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this Nineteenth day of December A. D. 1924.

EDWARD M. HOLLOWAY,

(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit begun and held in the United States Court Room in the city of Chicago, in said Seventh Circuit on the second day of October, 1923, of the October term in the year of our Lord one thousand nine hundred and twenty-three and of our Independence the one hundred and forty-eighth.

And afterwards, to wit: On the twenty-fifth day of July, 1924, came the Plaintiff in Error by its counsel, Messrs. Homer W. Davis, Emmet Trainor and Thomas F. King and filed in the office of the clerk of this court their appearances, which said appearances are in the words and figures following, to wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit

No. 3475. October Term, 1923.

Atchison, Topeka & Santa Fe Ry. Company,
Pltf. in Error,

—vs—

United States of America,
Deft. in Error.

The clerk will enter my appearance as counsel for the Plaintiff in Error.

HOMER W. DAVIS,
EMMET TRAINOR,
THOMAS F. KING,
1011 Railway Exchange Building.

Endorsed: Filed July 25, 1924. Edward M. Holloway, Clerk.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit begun and held in the United States Court Room in the city of Chicago in said Seventh Circuit on the seventh day of October, 1924 of the October Term in the year of our Lord one thousand nine hundred and twenty-four and of our Independence the one hundred and forty-ninth.

And on the same day, to wit: On the seventh day of October, 1924, the following further proceedings were had and entered of record, to wit:

Tuesday, October 7, 1924.

Court opened by proclamation of crier.

Present:

Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. George T. Page, Circuit Judge.
Edward M. Holloway, Clerk.
Robert R. Levy, Marshal.

The Atchison Topeka & Santa Fe Railway Company
3475 —*vs*—
United States of America.

Error to the District Court of the United States for the Northern District of Illinois; Eastern Division.

It is now here ordered that this cause be, and the same is hereby set down for hearing Wednesday, November 12, 1924.

And afterwards, to wit: On the twelfth day of November, 1924, the following further proceedings were had and entered of record, to wit:

The Atchison Topeka & Santa Fe Railway Company
3475 —*vs*—
United States of America.

Error to the District Court of the United States for the Northern District of Illinois; Eastern Division.

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel and on oral arguments by Mr. Homer W. Davis and Mr. E. C. Craig, counsel for plaintiff in error and by Mr. M. C. List, counsel for defendant in error and the

court having heard the same takes this matter under advisement.

And afterwards, to wit: On the twenty-sixth day of November, 1924, there was filed in the office of the clerk of this court the opinion of the court, which said opinion is in the words and figures following, to wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 3475. OCTOBER TERM AND SESSION, 1924.

The Atchison, Topeka and Santa Fe Railway Company, *Plaintiff in Error,* *vs.* United States of America, *Defendant in Error.* } Error to the District Court of the United States for the Northern District of Illinois, Eastern Division.

Before ALSCHULER, EVANS and PAGE, *Circuit Judges.*

EVANS, *C. J.:* Plaintiff was convicted of violating Section 2 of the Hours of Service Act (34 Stat. L. 1415). The material portions of the Act so far as this case is concerned, read as follows:

> "Provided, That no operator, train dispatcher, or other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four hour period in all towers, offices, places, and stations continuously operated night and day."

Two questions, the answers to which are determinative of liability, are (a) Was defendant's yardmaster an "operator, train dispatcher or other employee" within the meaning of the statute? (b) Were the telephone messages that he received or transmitted "orders" within the meaning of the statute?

The facts are not involved or controverted.

The yard master in charge of the switching and movement of cars in the Chicago yards communicates with the Corwith towerman, about one and one-half miles distant, by telephone. The tower man's duties are various, but those material to this case are limited to those wherein he and the yardmaster cooperated in the movement of trains.

When the tower man wanted to send a train into the yards, he 'phoned the yardmaster over a wire used for that purpose and so informed him. If the tracks in the yards were sufficiently clear to admit the entry of the train, the yardmaster would reply "Let her come." If the tracks in the yard were full, the yardmaster would so advise the tower man, or as illustrated in the record, he would say, "Let her follow up No. 39."

In sending out trains from the yards a similar practice prevailed. The yardmaster would advise the tower man over the 'phone that he had a train "made up" ready to "go out." The tower man would reply, "Let her come," or "Hold her until I get No. ..... out of the way," depending upon the condition of the tracks outside the yards, etc.

Question (a) above stated must be answered in the affirmative on the authority of *Chicago Rock Island & P. Co. Ry.* v. *United States*, 226 Fed. 27; *Chicago & Alton R. R. Co.* v. *United States*, 244 Fed. 945; *Chicago & Alton R. R. Co.* v. *United States*, 247 U. S. 197.

The holding of these cases is to the effect that the rule of *ejusdem generis* does not apply to the construction of the words of this statute.

The real controversy is over question (b) heretofore stated.

The term "order" has been defined in *United States* v. *H. B. & T. Ry. Co.*, 205 Fed. 344, and with the conclusions there reached we agree. "Orders" as used in this statute should not be limited to train orders issuing from the train dispatcher's office. Neither should the term be restricted to those reduced to writing. Orders may be given by one authorized so to do merely through the wave of a lantern, the movement of arms, or by the change of light in a signal station.

There is a difference, as counsel for plaintiff in error point out, between giving orders and imparting information. This may be well illustrated in a switching operation in the night. The brakeman who makes the coupling may give information to the conductor by the swinging of his lantern. The con-

ductor will then give a somewhat similar lantern signal to the engineer. Both of these signals are informative, but one is purely so, while the other is primarily an order.

The testimony in the present case does not permit of a conclusion which recognizes the communications that pass between the tower men and switchmen merely as information. The communications that were received or delivered over the telephone were "orders" which the receiving party was not at liberty to ignore. They dealt with the movement and operation of trains. Their form—whether in the nature of a command or worded as a request, is not at all determinative of the question.

Our decision is based upon the conclusion we have reached respecting the nature and necessary effect of the directions which passed between these two employees of the company. We think they were "orders" within the meaning of the Statute.

The judgment is AFFIRMED.

And on the same day, to wit: On the twenty-sixth day of November, 1924, the following further proceedings were had and entered of record, to wit:

Wednesday, November 26, 1924.

Court met pursuant to adjournment.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding.
Hon. Evan A. Evans, Circuit Judge.
Hon. George T. Page, Circuit Judge.
Edward M. Holloway, Clerk.

3475 The Atchison Topeka & Santa Fe Railway Company —*vs*— United States of America. } Error to the District Court of the United States for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois; Eastern Division.

On consideration whereof: It is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be, and the same is hereby affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 49 to 53, inclusive, contain a true copy of the proceedings had and papers filed (except the briefs of counsel) in the case of

The Atchison, Topeka and Santa Fe Railway Company

vs.

The United States of America

No. 3475, October Term, 1923, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this Nineteenth day of December, A. D. 1924.

EDWARD M. HOLLOWAY,
(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 13, 1925

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

It is further ordered that this cause be, and the same is hereby, assigned for argument on Monday, November 2d next, after the cases heretofore assigned for that day.

FEB 11 1925
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1924. 1925

No. [redacted] 273

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO BE ADDRESSED TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

HOMER W. DAVIS,
EDWARD C. CRAIG,
Attorneys for Petitioner.

JOHN G. DRENNAN,
NELSON J. WILCOX,
J. A. CONNELL,
Of Counsel.

GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1924.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO BE ADDRESSED TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

Your petitioner, The Atchison, Topeka and Santa Fe Railway Company, respectfully states that it is greatly aggrieved at the rendition on the 26th day of November, A. D. 1924, of a judgment by the United States Circuit Court of Appeals for the Seventh Circuit, against it, and in favor of the respondent, United States of America, in the sum of $600, together with interest and costs.

Your petitioner now prays this Honorable Court for a writ of certiorari so that said judgment may be reviewed and reversed.

Your petitioner further shows that this suit was originally brought in the District Court of the United States for the Northern District of Illinois, Eastern Division, on the 2nd day of December, A. D. 1921, and that upon a

trial before the court, a jury having been waived, a finding and judgment thereon in the sum of $600 were rendered on the 10th day of May, A. D. 1924, in favor of the respondent and against the petitioner. (R. 9, 10, *The A. T. & S. F. R. Co.* v. *United States of America,* 298 Fed. Rep. 549.)

Your petitioner further shows that, to review that judgment, on the 10th day of July, A. D. 1924, a writ of error was sued out of the United States Circuit Court of Appeals for the Seventh Circuit by the petitioner, and that on the hearing of the said writ of error that said judgment of the District Court of the United States for the Northern District of Illinois, Eastern Division, was affirmed, as above stated. (R. 53, *The A. T. & S. F. R. Co.* v. *United States of America,* ..... Fed. Rep. .....)

Importance of Case.

This case is one of a number brought in the same court at the same time for the purpose of determining whether yardmasters who, ever since the passage of the Hours of Service Act have been treated by practically all railroads as not within the purview thereof, are in fact included within the terms of said Act.

Under an agreement entered into in connection with the several cases, the remaining cases are to abide the final decision herein.

According to statements of officials of the Yardmasters' Union, given to the press at the time this case was tried, some 10,000 yardmasters are affected. It is, of course, desirable, both from the standpoint of the Commission, the railroads and the yardmasters, that their status for the country as a whole shall be definitely fixed by a Court whose decision is the law in all Circuits.

STATEMENT OF THE CASE.

This is a suit brought by the United States of America against the petitioner, to recover penalties for alleged violations of the Hours of Service Act. (34 Stat. L. 1415.)

The declaration consisted of six counts and alleged that the petitioner had violated said act by requiring and permitting on July 7, 8, and 9, 1921, a certain "*operator and employee,*" J. T. Bray (day yardmaster), and another "*operator and employee,*" H. T. McCollum (night yardmaster), to be and remain on duty at petitioner's "office and station at Chicago," longer than 9 hours in each 24-hour period; that said "office and station" was continuously operated night and day; and that the employees while required and permitted to remain on duty as aforesaid "by the use of the telegraph or telephone dispatched, reported, transmitted, received and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce." (R. 2-6.)

Issue was joined (R. 7), and by written stipulation a jury was waived and the cause submitted to the court. (R. 8.)

The material portion of the Hours of Service Act, so far as this case is concerned, is the first *proviso* of Section 2 of said act, which reads as follows:

> "Provided that no operator, train dispatcher, or other employee, who, by the use of the telegraph or telephone, dispatches, reports, transmits, receives or delivers orders pertaining to or affecting train movements, shall be required or permitted to be or remain on duty for a longer period than 9 hours in any 24-hour period, in all towers, offices, places and stations continuously operated night and day."

The questions involved are whether the petitioner's

yardmasters at its Corwith yard, in the City of Chicago, are within the Hours of Service Act, whether they were on duty at a "place" within the act, and whether they, "by the use of the telephone," dispatched, reported, transmitted, received and delivered "orders" pertaining to and affecting the movement of trains.

As shown by the map or print (Government's Exhibit 2, R. 13), the main line of the petitioner's railway enters the City of Chicago from the west and runs in a general easterly direction. A short distance east of the city limits is the petitioner's Corwith yard, which extends in a northerly and southerly direction, and lies south of, and almost at right angles to, its main line. The northerly end of the yard is about three blocks south of the main line. The Corwith yard is the yard into which freight trains from the west run, entering therein over a wye. Upon arrival in the yard, the road engine is taken off, *and the trains are broken up,* and the cars delivered from there by switch engines to connecting lines, team tracks or industries. Road trains for the west *are made up* in the yard and depart from it. "No through trains from the City of Chicago pass through that yard and no passenger trains go through." (R. 22.)

The yardmaster on duty at Corwith yard has jurisdiction over and control of all train movements *within* that yard, as distinguished from movements of trains when *coming into* or *going out of* the yard. (R. 29.) The trains are "made up" and "broken up" in that yard under the yardmaster's directions. Of that he has complete control. All orders given by him concerning such movements are given to the switch crews *verbally.* None are given by telephone to any train crews. (R. 23.) "They are all verbal." (R. 26.)

> "The duties of the yardmaster, are to supervise all of the switching that comes within his jurisdic-

> tion, regardless of whether it is freight house work, shop work, making up, or breaking up, or delivering trains.
>
> All orders given for the movement of cars, trains, or engines in the yard, are given orally to the foreman who has charge of the various engines, or perhaps the switchtender or assistant yardmaster. * * *" (R. 29.)

The duties of the yardmaster do not require him to remain at any one "place." He is all over the yard.

The yardmaster testifying for the Government said (R. 23, 24):

> "We get there at 6 o'clock in the morning, look over the yard reports—'turn over,' as they call them, from one man to the other. My assistant gets there at 7 o'clock. * * *
> He takes a check of the yard and comes back in and reports it to the trainsmaster's office upstairs. I most generally go out then and look around the yard and see that things are right. I look for stragglers or cars going astray and the likes of that, cars without loads, laying around, and looking after the engines. Well, I come back maybe in half an hour, maybe two hours or three hours."

The claimed violations of the Hours of Service Act are not with reference to movements within the yard. They have reference to the movement of trains over the Chicago & Alton crossing when *coming into* or *going out of* the yard. The trains, when making those movements, are controlled, and receive their "orders" from others.

The road trains coming in or going out of the yard move solely under orders from the towerman at the Corwith tower, whose tower is north of and outside the Corwith yard. (R. 15, 16.) The towerman was under general instructions to permit all trains or engines to go by (R. 27) and special whistle signals were prescribed which permitted the engineer to advise the towerman of the track on which he desired to proceed (R. 29). "The

yardmaster has no jurisdiction over the towerman, or the towerman over the yardmaster." (R. 29.)

The dispatcher with reference to outgoing trains sends his orders through the telegraph operator at the Corwith station, located a few hundred feet south of the yardmaster's office, which is at the north end of the yard. (R. 15.) The Corwith tower is just about as far north of the yardmaster's office as the operator's office is south of it. (Map, R. 13.)

The yardmaster testifying for the Government (R. 15) said:

> "I have no orders to give to road trains. The Dispatcher handles his trains with written orders, *which are given to road trains before they start out of the yard.*"

The trains coming into the yard were controlled by the Corwith towerman who was (R. 27) "under the Superintendent of Terminals of the Chicago & Alton Railroad Company." The yardmaster, still testifying, said (R. 22, 23):

> "The Corwith Towerman was under the jurisdiction of the Chicago and Alton. He was not under my jurisdiction or subject to my orders. When I wanted to get a train out of the yard lively or something like that, I would call him up. *As to whether he would let the train out or not was a matter for him to determine.*
>
> If a train approaching the interlocking plant wanted to go east, it would whistle twice, and if it wanted to go west it would whistle three times. The Towerman then determined whether the board should be given or not. I had no control or power over him to tell him to give them the board or not to give them the board. * * *
>
> Whether he would let the train in or not depended on his judgment and not mine, except that I had room for it.
>
> Mr. Drennan: Q. Now, under whose directions

and orders would he let them in after you had given the information that there was room for it?

A. His own."

The tracks north of the yardmaster's office are known as "lead tracks," and numerous tracks diverge therefrom. In the operation of the yard it is necessary for switch engines with cars attached to use the lead tracks north of his office almost continually, except of course when trains are entering or leaving the yard over the lead tracks. (R. 25.)

It is, therefore, desirable for the yardmaster to know, when trains are going out of the yard, whether or not the Corwith towerman will let them move promptly over the crossing. For the same reason it is also desirable for the towerman to know before he sends a train into the yard that the yardmaster has a clear track to put it on. Otherwise, the lead track would be occupied, and the switching operations in the yard brought to a standstill. To obtain *information* with reference to those conditions, communication was had between the towerman and the yardmaster over the telephone. (R. 25.)

These communications between the towerman and the yardmaster with reference to the trains coming into or going out of the yard, over the telephone, are the bases for this suit.

These conversations were of two kinds, namely, conversations relating to trains *going out of* the yard, and to trains *coming into* the yard. The communications were, however, not essential or necessary to the movement of the trains *in* or *out*.

"If the telephone was taken out of the Yardmaster's office, the business would go right on. I went to work in the north end of the Corwith Yard in 1894. They had no telephone connections with the tower at that time. Trains operated in and out of

the yard on whistle signals as laid down in the Terminal Time-Card, just as they are now. They have never been changed. The telephone is simply a matter of convenience." (R. 30.)

The yardmaster describes the reasons for these communications as follows (R. 25):

"Trains coming into the yard have all the way from one car to a hundred cars. A train of 100 cars would be about a mile long—just the full length of the yard and would require a clear track for the entire length of the yard to pull it on. Otherwise it would block the C. & A. crossing.

We use the lead tracks at the north end of the yard for switching purposes. We run back and forth there all day long, except when a train is coming into or going out of the yard. Then we must keep it clear.

When we get information that a train is ready to come into the yard, we get our switch engines off the lead track at the north end of the yard.

On the day when the B. & O. C. T. train came up and the Towerman told me it wanted to come into the yard, and I said to 'hold it off,' the reason for that was, we were so full we could not handle it at that time.

The Towerman could have let the train come into the yard if he had wanted to without any danger to the train. It would have been stopped by the switches at the north end of the yard, but it would have blocked the C. & A. traffic. The effect of my statement was that if the train came in and it could not get by the switches, it would have blocked the C. & A. crossing. There was no room for it.

Road trains get written orders from the telegraph operator at the freight station. When they get their orders they are ready to go. I generally call up the towerman when they whistle. If he says he cannot let them out, I don't let them start. I go out and give them a hand sign to stay where they are.

Some engineers would pull up to the board if it was set for them to stop and tie up the north end of the yard. The Towerman might hold them there 30 minutes, during which time we could not work. The

reason I find out whether the Towerman can let them go by, is so that I can keep them from pulling up to the north end of the yard and blocking the tracks."

The Circuit Court of Appeals stated the facts about the incoming and outgoing trains as follows:

> "When the towerman wanted to send a train into the yards, he 'phoned the yardmaster over a wire used for that purpose and so informed him. If the tracks in the yards were sufficiently clear to admit the entry of the train, the yardmaster would reply, 'Let her come.' If the tracks in the yard were full, the yardmaster would so advise the towerman, or as illustrated in the record, he would say, 'Let her follow up No. 39.'
>
> In sending out trains from the yards a similar practice prevailed. The yardmaster would advise the towerman over the 'phone that he had a train 'made up' ready to 'go out.' The towerman would reply, 'Let her come,' or 'Hold her until I get No. ..... out of the way,' depending upon the condition of the tracks outside the yards, etc."

The Circuit Court of Appeals held that this showed that *orders* were given and received between the towerman and the yardmaster over the telephone concerning the movement and operation of these trains, and that the communications between them did not constitute *information* as contended for by the plaintiff in error. In doing so the Court said:

> "The testimony in the present case does not permit of a conclusion which recognizes the communications that pass between the towermen and switchmen merely as information. The communications that were received or delivered over the telephone were 'orders' which the receiving party was not at liberty to ignore. They dealt with the movement and operation of trains. Their form—whether in the nature of a command or worded as a request, is not at all determinative of the question.
>
> Our decision is based upon the conclusion we have reached respecting the nature and necessary effect of the directions which passed between these two

employees of the company. We think they were 'orders' within the meaning of the Statute."

The court therefore affirmed the judgment of the lower court.

Contention of Petitioner.

Petitioner insists—

(1) That the Hours of Service Act does not cover and include a yardmaster.

(2) That the rule of *ejusdem generis* applies to this statute, and being applied thereto the statute only covers operators, train dispatchers, and employees of that class.

(3) That the yardmasters neither gave nor received *orders* to or from any one in the Corwith yard by telephone, and for that reason did not come within the Hours of Service Act.

(4) That the telephonic communications between the towerman and the yardmaster consisted of receiving and transmitting *information* and not *orders*.

(5) That the statute does not apply in this case for the reason that the yardmaster is not "on duty for a longer period than 9 hours in any 24-hour period, in a * * * *place*."

Conflict of Decisions.

The decisions of the Circuit Courts of Appeal for the several circuits of the United States are not in harmony with reference to whether the rule of *ejusdem generis* applies.

The Circuit Court of Appeals for the Eighth Circuit has held in the case of *Missouri Pacific Ry. Co.* v. *United States*, 211 Fed. 893, that—

"Where general words follow an enumeration of

particular classes of persons or things, they will be construed as applicable only to persons or things of the same general nature or class as those enumerated. The particular words are presumed to describe certain species and the general words to be used for the purpose of including other species of the same genus. The rule is based on the obvious reason that, if the Legislature had intended the general words to be used in their unrestricted sense, they would have made no mention of the particular classes. The words 'other' or 'any other,' following an enumeration of particular classes, are therefore to be read as 'other such like,' and to include only others of like kind or character. *First National Bank of Anamoose* v. *United States,* 206 Fed. 374, 379, 124 C. C. A. 256, 46 L. R. A. (N. S.) 1139; Cyc. vol. 36, p. 1120, and cases cited. * * *

As the word 'employee' in the proviso of section 2 includes 'operator' and 'train dispatcher,' for the latter are both employees, the conclusion here is irresistible that Congress intended by the use of the words 'other employee' to mean an employee engaged *primarily* in the same class of service as would be performed by an operator or train dispatcher. If this be the right construction to place upon the proviso, then R. Connell and J. W. King were not in any sense employees, whose primary duty was to dispatch, report, transmit, receive, or deliver by the use of the telegraph or telephone orders pertaining to or affecting train movements within the meaning of the proviso. While, as has been said before, we must give the law such a construction as will promote the purpose of the law, in our zeal to do so, however, we must not attempt to legislate ourselves."

The Circuit Court of Appeals for the Seventh Circuit, in this and other cases decided by it, has held otherwise. (*C. R. I. & P. Ry. Co.* v. *United States,* 226 Fed. 27; *C. & N. W. R. Co.* v. *United States,* 226 Fed. 30.)

There is therefore a square conflict in the decisions of the Circuit Courts of Appeal on this question.

The only case decided by this court, *Chicago & Alton R. Co.* v. *United States,* 247 U. S. 197 (hereinafter discussed) did not reconcile this conflict since the point is not mentioned.

There is also a square conflict between the case at bar, as decided by the Circuit Court of Appeals of the Seventh Circuit, and the case of *Missouri Pacific Ry. Co.* v. *United States,* 211 Fed. 893, in that the switch tenders in that case were held not to be within this proviso of the Act, while the yardmasters in this case were held by the Circuit Court of Appeals of the Seventh Circuit to be within the Act.

Decisions as to Yardmaster.

There has been only one case of this kind other than this involving a *yardmaster.* That was the case of *United States* v. *Pennsylvania R. R. Co.* 239 Fed. 576. In that case there was a conviction, but there the proof showed that the yardmaster gave orders to switchmen and signalmen with reference to the movement of trains within the yard by telephone. "The telephone is used by the yardmasters although they may give the message in other ways and frequently do."

Only Case Decided by this Court.

The only decision by this Court having any possible bearing on this case is the case of *C. & A. R. R. Co.* v. *United States,* 247 U. S. 197. That case involved a *switch tender,* as this Court said, "on duty for twelve consecutive hours, *in a shanty* continuously operated night and day, *where,* by the use of the telephone, he received and delivered *orders* pertaining to train movements—*not mere switching movements within the yards;* and in

such service mental and physical alertness are of great importance."

In the *instant* case the yardmaster was not "on duty for twelve consecutive hours *in a shanty*" or any other *place* "*where* by the use of the telephone he received and delivered orders pertaining to train movements." He had no such "*post of duty*" or "*character of work.*"

The yardmaster said (R. 22):

> "I was in the office between one-half to two-thirds of the time. The greater part of the telephoning I do is on commercial business. People call up and make inquiry as to whether their cars are in the yard or what has been done with them."

It has been held, and properly so, that the Hours of Service Act does not apply to a train conductor because he is not on duty in any one *place.* (*United States* v. *Florida East Coast Ry. Co.* 222 Fed. 33.)

Specification of Errors.

Petitioner now files the following as its assignment or specification of errors:

Petitioner complains that the following errors were committed by the Circuit Court of Appeals for the Seventh Circuit:

(1) The Circuit Court of Appeals for the Seventh Circuit erred in construing the Hours of Service Act, in that it held that the yardmaster of the plaintiff in error was an "operator, train dispatcher *or other employee*" within the meaning of the statute.

(2) The Circuit Court of Appeals for the Seventh Circuit erred in holding that the telephone messages that the yardmaster received or transmitted were "orders" within the meaning of the statute.

(3) The Circuit Court of Appeals of the Seventh Circuit erred in holding that the yardmaster was employed at a "place" within the meaning of the statute.

Wherefore the petitioner prays that the judgment herein be reversed.

Prayer.

Your petitioner now prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit and the Justices thereof, commanding the said court to certify and send to this court a full and complete record of the transcript and all the proceedings of said United States Circuit Court of Appeals in this cause entitled *The Atchison, Topeka and Santa Fe Railway Company* v. *United States of America*, No. 3475, on the docket of said United States Circuit Court of Appeals, to the end that this cause may be reviewed and determined by this court. And your petitioner prays that the certified copy of the record and proceedings of the United States Circuit Court of Appeals for the Seventh Circuit, which are filed as a part of and as an exhibit to this petition, may be treated as a return to said writ of certiorari, and your petitioner prays that it may have such other and further remedies and relief in the premises as to this court may seem appropriate and in conformity with law and the judgment of the United States Circuit Court of Appeals for the Seventh Circuit in this cause and every part thereof be reversed by this Honorable Court, and your petitioner will ever pray, etc.

This is the first application for writ of certiorari in this cause.

HOMER W. DAVIS,
EDWARD C. CRAIG,
Attorneys for Petitioner.

JOHN G. DRENNAN,
NELSON J. WILCOX,
J. A. CONNELL,
Of Counsel.

HOMER W. DAVIS, being duly sworn, makes oath that he is one of the counsel for petitioner in the above cause and that he assisted in the preparation of the foregoing petition, and that the allegations therein are true as he verily believes.

HOMER W. DAVIS.

Sworn to and subscribed before me this 5th day of February, 1925.

JOHN A. McDONALD,
(SEAL) *Notary Public for Cook County,*

My commission expires November 14, 1925.

In my opinion the foregoing petition is well founded in law.

HOMER W. DAVIS,
EDWARD C. CRAIG.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1924.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

Three questions are involved in this petition for certiorari. They are as follows:

I.

DID THE CIRCUIT COURT OF APPEALS PROPERLY HOLD THAT THE RULE OF EJUSDEM GENERIS SHOULD NOT APPLY IN THE CONSTRUCTION OF THIS ACT?

II.

WERE THE COMMUNICATIONS BETWEEN THE TOWERMAN AND THE YARDMASTER "ORDERS" AS DISTINGUISHED FROM "INFORMATION"?

III.

DID "THE POST OF DUTY" OF THE YARDMASTER BRING HIM WITHIN THE ACT?

We will discuss these questions very briefly in the above order.

I.

DID THE CIRCUIT COURT OF APPEALS PROPERLY HOLD THAT THE RULE OF EJUSDEM GENERIS SHOULD NOT APPLY IN THE CONSTRUCTION OF THIS ACT?

It is needless in the discussion of this question to do more than remind your Honors of the general and elementary rule that where general follow specific terms that the general terms are limited by the specific terms, and do not enlarge the meaning thereof or include anything outside of the class or classes described by the specific terms. (Lord Tenterden's Rule: *United States* v. *Mescoll*, 215 U. S. 26.)

We have already called attention to the case of *Missouri Pacific Ry. Co.* v. *United States*, 211 Fed. 893, where the Circuit Court of Appeals for the Eighth Circuit applied this well known rule of construction to the language of this act, and held that "switch tenders were not within the act because they were not of the same class of employees as train dispatchers or operators."

No one can properly contend that, applying the rule of *ejusdem generis*, a yardmaster would come within the same class of employees as train dispatchers or operators. In fact, the District Court of the Eastern District of Pennsylvania, in the case of *United States* v. *Pennsylvania R. R. Co.* 239 Fed. 576, at page 580, expressly held that *yardmasters* would not come within the statute if this doctrine of *ejusdem generis* be applied. That Court there said:

> "The argument addressed to us by counsel for defendant is convincing so far as the character of the employees is involved. We are in entire accord with him that yardmasters do not belong to the class of dispatchers or operators who have to do with train movements. If the words 'other employees'

> are to be given this significance, we think the viewpoint of the defendant to be the correct one. Much may be said in support of this. It is a resulting consequence of the *ejusdem generis* doctrine."

We assert that the statute should be so construed. The pleader who drafted the declaration in this case seemed to recognize that this is true. The yardmasters involved were alleged not only to be employees, but "*operators.*" (R. 3, 4, 5, 6.)

The Circuit Court of Appeals for the Seventh Circuit, however, refused to apply this rule of construction, and in the case of *C. R. I. & P. Ry. Co.* v. *United States,* 226 Fed. 27, held that switch tenders "whose duties *primarily* involved the use of the telegraph and telephone in connection with" orders relating to the movement of trains and who "were *regularly* stationed at the *shanty* in which the telephone was located," and whose "duty to transmit the information by telephone to the Gresham leverman was not *incidental* but *regular* and *habitual*" came within the act, although "it was not, however, in any sense their principal and primary duty; that was to attend to the Blue Island freight yard switches."

In that case the test applied was not the rule of *ejusdem generis.* That rule of construction was rejected, and it was held that there was embraced within the act any "employee who ordinarily and habitually uses the telegraph or telephone for the purposes stated."

The same ruling was made by that court in the case of *C. & N. W. Ry. Co.* v. *United States,* 226 Fed. 30.

In the later case of *C. & A. R. R. Co.* v. *United States,* 244 Fed. 945, that same court held that *switch tenders* came within the act. In that case the question of the construction of the statute with reference to the doctrine of *ejusdem generis* was not discussed, but the court re-

ferred to its former decisions in the cases of *C. R. I. & P. Ry. Co.* v. *United States*, 226 Fed. 27, and *C. & N. W. Ry. Co.* v. *United States*, 226 Fed. 30, as decisive of what employees came within the act.

That Court applied the same tests as it had in the former cases and held that—

> "This use of the telephones by the switch tenders in connection with the movement of the trains was not occasional or exceptional, but was a part of their general and usual duties; each train movement so communicated to the crews or participated in by the switch tender being preceded by his reception of a telephone order directing it."

That case was brought on writ of error to this Court, where the case was decided and reported as *C. & A. R. R. Co.* v. *United States*, 247 U. S. 197, and this court in its opinion used this language:

> "The individuals within the ambit of the proviso's pertinent provisions are marked *by the nature of service performed*—an 'operator, train dispatcher, or other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements.' And the railroad is forbidden to permit one performing such service in 'towers, offices, places, and stations continuously operated night and day' to remain on duty therein longer than nine hours in twenty-four. *Both the post of duty and character of work are essential elements.* If, in due course of his work, an employee while *in any* of the *locations* specified uses the telegraph or telephone for sending or receiving messages concerning train movements, he may not lawfully remain on duty *therein* exceeding *nine* hours during any twenty-four-hour period, except in case of emergency.
>
> Here, the facts disclose the switch tender on duty for twelve consecutive hours *in a shanty* continuously operated night and day where, by the use of the telephone, he received and delivered orders pertaining to train movements—not mere switching movements within the yard; and in such service men-

tal and physical alertness are of great importance. By permitting this the railroad violated both language and purpose of the act."

It is apparent that it was not *expresssly* decided by this Court in that case that the doctrine of *ejusdem generis* should not be applied in the construction of this statute. In addition, all that that case does, is to hold that those particular switch tenders come within the act. *It by no means is an authority that these yardmaster do.* The switch tender there involved may in fact have been *an operator* or *train dispatcher*—a thing these yardmasters could not by the wildest imagination be held to be.

We desire in this case to squarely present to the Court the question as to whether or not the rule of *ejusdem generis* should be applied to this statute. If it be applied, of necessity yardmasters are not within the class referred to in the statute.

We most respectfully assert, from the language used in the act, that Congress, in enacting this statute, had in mind the particular class of employees who were confined to a room or desk, in and at which they were compelled to continuously remain during the time they were receiving or transmitting orders over the telephone, and that this particular class of men being subjected to work of this kind should not be compelled to work any longer than nine hours.

To use the language of the court in the case of *United States* v. *Pennsylvania R. R. Co.* 239 Fed. 576, the act was intended to be limited "to a class who were, because of the character of their employment, required to be mentally alert and wide awake, and were most likely to succumb to the strain of long hours *because they would be without the physical activity which would keep them alert and on the move.*"

We submit that there is no more reason for the statute applying to a yardmaster than to a train conductor, who, confessedly, would not be within the proviso, and who was expressly held in the case of *United States* v. *Florida East Coast Ry. Co.* 222 Fed. 33, not to be included therein.

There must be some limit to the application of this statute. That limit we asert should be that which exists by the application of the rule of *ejusdem generis*. We insist that that rule should be applied to the construction of this statute. If it is, yardmasters most certainly do not come within the act.

II.

WERE THE COMMUNICATIONS BETWEEN THE TOWERMAN AND THE YARDMASTER "ORDERS" AS DISTINGUISHED FROM "INFORMATION"?

The facts with reference to the communications, over the telephone, between the towerman at Corwith tower and the yardmaster, are set forth in the statement of the case. There is no necessity of our repeating them here. The evidence shows that the towerman had complete control of the trains going into and coming out of the yard. The fact that the yardmaster had complete control of the trains *within* the yard is of no significance for two reasons—first, the case is not based upon any movements of that kind, and second, movements wholly within the yard would not be train movements. (*United States* v. *Pennsylvania R. Co.* 239 Fed. 576.)

Our contention, with reference to this part of the case, is that the towerman having complete control of trains going into and coming out of the yard, telephoned the yardmaster only to obtain *information* with reference

to the condition of the yard, as to whether or not trains could be received in the yard, and that the yardmaster, not wanting his lead track filled by a standing train, only telephoned the towerman with reference to outgoing trains to give the towerman information as to their going out.

It is like the case of a conductor of a freight train, who is to put his train in a yard, where there is no yardmaster, and must obtain information as to the condition of the yard and on what sidetrack his train can be placed. If he should send forward a brakeman to ascertain the condition of the yard, and the brakeman should telephone to the conductor the information, the brakeman in doing so could say to the conductor over the telephone "hold her—the yard is full," or could simply say "hold her,"—that would indicate to the conductor that the yard was full and that the train could not be sent forward until some other movements were made in the yard, but it surely would not be giving an "*order*" over the telephone.

The distinction between "*information*" and "*orders*" is well brought out in the case of *United States* v. *Pennsylvania R. Co.* 239 Fed. 576, where the court said:

> "The risk which Congress had in mind to minimize is one flowing from the wrong moving of trains, resulting in collisions or other causes of injury to persons and property. Such movements could be made only at the will of some employee. In the final analysis this would be the engineer or other operator of the mechanism, but, as he moves at the direction of some other employee, without exercising any other will of his own than that of obedience, the 'order' to move, of which we are in search, comes from such other employee. This other employee, in his turn, does not act, except upon knowledge of the conditions, and this he gathers from information conveyed to him by still others. There is here a dis-

tinction. As before observed, there must be a mind which directs the movement. Whenever this is manifested, there is an order to move. *The distinction is between the information upon which the mind acts and the act.*

There are times when the two are difficult to distinguish, and the one blends into the other, and each becomes both. Take the instance of a train run on schedule and by the block signal system. *The signal is both information and an order to the engineer.* If it is not against him, it tells him the track is clear, and orders him to run to the next block. If some one, not a signalman, stands on the track waving a flag or his hat, the engineer will stop the train; *but this could not be said to be an order to stop.* The distinction and the difference and the test are here alike obvious, assuming the general orders to be that the engineer must obey the signal. Where the brakeman of a stalled train goes back to signal a following train, or a switchman waves to the engineer after throwing a switch, the distinction remains, and the test is the same, but the difference practically disappears. Railroad parlance supplies us with the required phrase—the brakeman is said 'to flag' the train. Another illustration is afforded by a station agent, who informs the engineer that a train ahead of him is in difficulties and may become stalled. Still another is afforded by the rule (not in the Book of Rules) put in evidence by the defendant and relied upon to support the defense. This rule informs those in charge of the train that it is likely to meet other trains within yard limits, and orders them to so run their train as that it may be stopped within the range of their vision.

The test, of course, is whether, in the cases instanced, the engineer uses his own judgment upon the information given, or whether he is without choice, and has no discretion in respect to what he will do. Practical railroading recognizes the distinction and classifies employees accordingly. Dispatchers and operators of block signal towers are recognized as those who *direct*, and because of this give *'orders'* for train movements. *Switchmen and brakemen do not give 'orders.'* Congress, wishing

to apply the act, not only to those who in the railroad sense directed train movements, but also to those through whose acts trains did in fact move, designated 'dispatchers' and 'operators' *eo nomine*, and added all employees whose duty it was to give information which pertained to or affected train movements, through being the practical equivalent of an order. It was at once seen, however, that if the enactment was so phrased the language was entirely too broad and general, and it was because of this limited to those who *conveyed* the information by telegraph or telephone. There were several reasons for a limitation of this kind. One was that it defined the class with practical precision, and excluded employees not meant to be embraced, because it was impractical to embrace them. *Another was that this limitation confined the act to a class who were, because of the character of their employment, required to be mentally alert and wide awake, and were most likely to succumb to the strain of long hours, because they would be without the physical activity which would keep them alert and on the move.* This gives us the fair meaning of the act of Congress, and it only remains to apply that meaning to the employees with whom we are now concerned."

There can be no doubt but that this case correctly sets forth the difference between *orders* and *information.*

The Circuit Court of Appeals for the Seventh Circuit, in deciding the case at bar, recognized that the *form* of the communication "is not at all determinative of the question" as to whether or not the communications between the towerman and the yardmaster were or were not orders. In this the Court was undoubtedly right—but the Court, in determining whether the communications were or were not "orders," applied improper tests and as a result thereof made, as we claim, the erroneous findings that it did.

The Court said with reference to the question as to

whether these communications were orders or information:

> "The testimony in the present case does not permit of a conclusion which recognizes the communications that pass between the towermen and switchmen merely as information. The communications that were received or delivered over the telephone were 'orders' which the receiving party was not at liberty to ignore. They dealt with the movement and operation of trains. Their form—whether in the nature of a command or worded as a request, is not at all determinative of the question.
>
> Our decision is based upon the conclusion we have reached respecting the nature and necessary effect of the directions which passed between these two employees of the company. We think they were 'orders' within the meaning of the Statute."

The Circuit Court of Appeals erred in this. The test by the court applied in determining whether the communications were or were not *orders* was not whether the receiving party had to *obey* them, which, if they were *orders,* he was under the necessity of doing, but was whether or not the communications received over the telephone were such that "the receiving party was not at liberty to *ignore.*" This would apply equally as well to information. Of necessity the receiving party, whose acts depend upon *information* obtained over the telephone, is "not at liberty to *ignore*" the information thus received. It is his duty to obtain the information and *act* on it. "The distinction is between the *information* upon which the mind acts and the *act.*" (*United States* v. *Pennsylvania R. Co.* 239 Fed. 576.) As the towerman said (R. 41):

> "After I get information from the yardmaster or any source that may be available, I act on my own judgment as to whether I shall give the engine the board or not."

The Court most certainly applied the wrong test in de-

termining whether the communications were information or orders. That of necessity is a question of law and not of fact. This is also shown by the fact that the court seemed to think that the fact that the communication "dealt with the movement and operation of trains." The mere fact that the *information* obtained "dealt with the movement and operation of trains" is certainly not controlling, and does not show that the communications were "*orders.*" The Act of Congress covers only "*orders*" and not "*information*" pertaining to or affecting train movements. The Circuit Court of Appeals is certainly in error in this holding.

III.

DID "THE POST OF DUTY" OF THE YARDMASTER BRING HIM WITHIN THE ACT?

It seems to us that the decision of this Court in the case of *C. & A. R. R. Co.* v. *United States,* 247 U. S. 197, above referred to, is conclusive of this question, and that under that decision "the post of duty" of the yardmaster did not bring him within the act. In that case this court said:

> "The individuals *within the ambit* of the proviso's pertinent provisions are marked by the nature of service performed. * * * *Both the post of duty and character of work are essential elements.* * * * Here, the facts disclose the switch tender on duty for twelve consecutive hours in a *shanty* continuously operated night and day *where,* by the use of the telephone, he received and delivered orders pertaining to train movements."

It is, therefore, very material in this case as to whether or not the yardmasters under consideration not only came within the *class* described by the statute, and gave or received *orders* over the telephone, but whether or not

they were in a *place* referred to by the statute. The act refers to "towers, offices, places and stations." We all know what "towers," "offices," and "stations" are. "Places" of necessity must refer to similar "places"—places like towers, offices and stations.

These yardmasters, as we have shown in the statement of the case, were not in their office more than one-half or two-thirds of the time, and most of the time while in the yard office, were engaged, while using the telephone, in receiving or sending communications of a commercial nature, and not in any way connected with the movement of trains. When out of his office the yardmaster was all over the yard. The yard was no more a "*place*" than would be the railroad.

The conductor referred to in the case of *United States* v. *F. E. C. Ry. Co.* 222 Fed. 33, was no more in a "*place*" than were the yardmasters in this case. We invite the attention of the Court to all the relevant cases decided under this act, in which penalties have been assessed, and to which we have above referred. In every one of them it appears that the employee involved was duty bound to remain and did remain practically continuously at a "*shanty*" or "office," and there be engaged in his work of receiving or sending "orders" by telephone or telegraph.

The statute, as we contend, and as is well said by this court in the *C. & A. R. R. Co. case, ubi supra,* only applies to employees defined by the statute, both as to the *post of duty* and *character of work.* These yardmasters have no such *post of duty* and of necessity do not come within the act.

It is true this court in the *C. & A. R. R. Co. case, ubi supra,* held that under the facts peculiarly pertinent to that case, the switch tender there involved came within

the act. The *character* of his work and the *post* of his duty brought him within the act. That by no means decides that the yardmasters in this case are within the act.

Conclusion.

We submit, therefore, that the Circuit Court of Appeals for the Seventh Circuit should have reversed the judgment of the District Court, instead of affirming the same, and that in consequence the judgment entered by the Circuit Court of Appeals is erroneous and should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1924.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

IN RE PETITION TO THE SUPREME COURT OF THE UNITED STATES FOR WRIT OF CERTIORARI.

To Mr. Elward A. Olson,
United States Attorney,
Chicago, Illinois. (Attorney for Respondent)

Please take notice that on ....., ... 1925, at noon, or as soon thereafter as counsel may be heard, the foregoing petition and brief will be submitted to the Supreme Court of the United States at its usual

session at the Capitol in Washington, D. C., for its consideration and action.

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Of Counsel.

....., 19.....

We acknowledge service of a copy of the foregoing petition, brief and notice.

This ....., 19.....

.....
Attorney for Respondent.

(Italics and bold-faced type herein are those of the author of this petition and brief.)

FILED
OCT 21 1925
WM. R. STANSBURY
Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 273

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF AND ARGUMENT FOR PETITIONER.

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CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF AND ARGUMENT FOR PETITIONER.

STATEMENT OF THE CASE.

This case is here pursuant to writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit, granted on application of The Atchison, Topeka and Santa Fe Railway Company (hereinafter referred to as the "Santa Fe"), against which a judgment for $600 was entered in favor of the United States by the District Court for the Northern District of Illinois, Eastern Division (*United States* v.

All italics in this brief are ours.

A. T. & S. F. Ry. Co. 298 Fed. 549), which judgment on writ of error was affirmed by said Court of Appeals, (*A. T. & S. F. Ry. Co.* v. *United States*, 3 Fed. (2) 138).

The declaration consists of six counts, and alleges that the Santa Fe had violated the Hours of Service Act by requiring and permitting on July 7, 8 and 9, 1921, a certain "operator and employee," J. T. Bray (day Yardmaster), and another "operator and employee," H. T. McCollum (night Yardmaster), to be and remain on duty at the Santa Fe "office and station at Chicago," longer than nine hours in each 24-hour period; that said "office and station" was continuously operated night and day; and that the employees while required and permitted to remain on duty as aforesaid "by the use of the telegraph or telephone dispatched, reported, transmitted, received and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce." (Rec., 2, 6.)

Ultimate Question.

The ultimate question is whether the hours of service of Santa Fe Yardmasters in its Corwith Yard at Chicago, Illinois, were limited by said statute.

Statute Involved.

This action is brought under the first proviso to Section 2 of the Hours of Service Act (Act of Congress, March 4, 1907, C. 2939, 34 Stat. 1415), which section is as follows:

> "Sec. 2. That it shall be unlawful for any common carrier, its officers or agents, subject to this Act to require or permit any employee subject to this Act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employee of such common car-

rier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty; and no such employee who has been on duty sixteen hours in the aggregate in any twenty-four-hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty: *Provided, That no operator, train dispatcher, or other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four-hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places, and stations operated only during the daytime, except in case of emergency, when the employees named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four-hour period on not exceeding three days in any week: Provided further,* The Interstate Commerce Commission may after full hearing in a particular case and for good cause shown extend the period within which a common carrier shall comply with the provisions of this proviso as to such case."

LOCATION AND DESCRIPTION OF THE YARD, VARIOUS RAILROADS, CONNECTING TRACKS, ETC., REFERRED TO IN THE EVIDENCE.

As shown by the map or print (Government's Exhibit 2, Rec., 13), the main line of the Santa Fe enters the City of Chicago from the west and runs in a general easterly direction between the channels of the Sanitary District and the Illinois and Michigan Canal, which are parallel and about 500 feet apart. The Chicago and Alton main line is just south of and parallel with the Illinois and Michigan Canal. A short distance east of

the city limits, and between Crawford and Kedzie Avenues, is defendant's Corwith Yard, *which extends in a northerly and southerly direction* and lies south of and almost at right angles to its main line, the Illinois and Michigan Canal, and the Chicago and Alton main line.

The northerly end of the yard is about four blocks south of the Santa Fe main line and about one block south of the Chicago and Alton main line. The main line and the yard are connected by two wye tracks. One —the "West Wye"—takes care of traffic moving into the yard from the west or out of the yard for the west. The other wye takes care of traffic moving between the yard and points easterly thereof. (Ex. 2, Rec., 13.)

A track also runs from the yard straight north across defendant's main line, forming a connection with what is referred to in the testimony as the Illinois Northern line but shown on the print as 26th Street line. (Rec., 29.)

There is also a wye connection between the Alton main line and the yard of the Santa Fe, over which traffic moves between the yard and the Alton main line.

About a mile and a half west of the Corwith Yard, the Chicago and Western Indiana and the Belt Railroads cross, in a northerly and southerly direction, the Alton and the Santa Fe main lines. This crossing is governed by an interlocking plant operated by a Towerman in a tower marked on the print "Nerska Tower," and so referred to in the evidence. (Ex. 2, Rec., 13.)

Almost three miles east of Corwith, the Pan Handle tracks cross the Santa Fe main line at what is known as the Ash Street crossing. East of the Ash Street crossing is a joint line used by the defendant and the Illinois Central Railroad Company, and farther east

and north, at 18th Street and Wentworth Avenue, is located what is known as the 18th Street Yard of the defendant, where another Yardmaster is located.

Function of Corwith Yard.

The Corwith Yard is the yard into which freight trains from the west run, entering over the west wye. Upon arrival, the road engine is then taken off and the trains are broken up, some of the cars composing the same being delivered to connecting lines by switch engines, and others being sent down by switch engines to the 18th Street Yard for unloading at the defendant's freight station or delivery of their contents to consignees direct from the cars. Others are delivered to industries along the Santa Fe main line by switch engines. Engines from other lines also bring cars to the Corwith Yard for delivery to the Santa Fe.

Road trains for the west *are made up* in the yard and depart from it. *"No through trains from the City of Chicago pass through that yard and no passenger trains go through."* (Rec., 22.)

The Corwith Yardmaster.

The Yardmaster on duty at Corwith Yard has an office at the north end of the yard (Ex. 2, Rec., 13) and has jurisdiction over and control of all train movements within that yard, as distinguished from movements of trains when coming into or going out of the yard. (Rec., 29.) The trains are "made up" and "broken up" in that yard under the Yardmaster's directions. (Rec., 24, 29.) Of that he has complete control. All orders given by him concerning such movements are given to the switch crews

verbally. None are given by telephone to any train crews. (Rec., 23.) "They are all verbal." (Rec., 26.)

> "The duties of the Yardmaster, are to supervise all of the switching that comes within his jurisdiction, regardless of whether it is freight house work, shop work, making up, or breaking up, or delivering trains.
>
> All orders given for the movement of cars, trains, or engines in the yard, are given orally to the foreman who has charge of the various engines, or perhaps the switchtender or assistant yardmaster." (Rec., 29.) "The switch tenders stay at or near my office. I give them their instructions verbally." (Rec., 24.)

The evidence shows no conversation over the telephone of any kind with reference to movement of trains within Corwith Yards. The Yardmaster testifying (Rec., 23), said:

> "In the movements of the trains in the yard over which I had jurisdiction I did not give any orders on the days in question by telephone to any train crews."

The duties of the Yardmaster do not require him to remain at any one "place." He is all over the yard.

The Yardmaster testifying for the Government said (Rec., 23, 24):

> "We get there at 6 o'clock in the morning, look over the yard reports—'turn over,' as they call them, from one man to the other. My assistant gets there at 7 o'clock * * * he takes a check of the yard and comes back in and reports it to the Trainmaster's office upstairs. I most generally go out then and look around the yard and see that things are right. I look for stragglers or cars going astray and the likes of that, cars without loads, laying around, and looking after the engines. Well, I come back maybe in half an hour, maybe two hours or three hours."

THE CORWITH TOWER, AN INTERLOCKING PLANT, GOVERNS THE SANTA FE AND CHICAGO AND ALTON TRAIN MOVEMENTS PAST CORWITH YARD AND ALL MOVEMENTS OVER CONNECTING TRACKS BETWEEN THE YARD AND MAIN LINES.

About two blocks (and not a "mile and a half" or "a few miles" as erroneously stated in the opinion of the Circuit Court of Appeals as the same appears respectively in the record and in 3 Fed. (2) 138), north of the north end of the Corwith Yard and the yardmaster's office, and between the Santa Fe and the Chicago and Alton main lines, an interlocking plant, known as the Corwith Tower, is located (Ex. 2, Rec., 13), by means of which switches, derails and signals, situated the proper distance east and west, and north and south thereof, are so manipulated that no trains can move past such signals unless they are clear. This applies to Santa Fe and Chicago and Alton main line through trains which are not destined to the yard, but are bound either for downtown east of the yard, or for the west, as well as to all trains going into or coming out of the yard, over tracks connecting the same with the main lines.

THE CORWITH TOWERMAN, A JOINT SANTA FE AND CHICAGO AND ALTON EMPLOYEE, WHO TAKES ORDERS FROM NEITHER COMPANY, BUT KEEPS TRAFFIC MOVING BY EXERCISING HIS INDEPENDENT JUDGMENT IN THE LIGHT OF INFORMATION RECEIVED FROM EVERY AVAILABLE SOURCE.

The Towerman is a joint employee and is under general instructions to permit all trains or engines to go by, using his own judgment so as to avoid blocking the crossing (Rec., 23, 27, 28). Special whistle signals were prescribed which permitted the engineer to advise the Towerman of the track on which he desired to proceed. These whistle signals are as follows (Rec., 29):

"Whistle signals for interlocking systems.

Trains leaving Corwith Yard, one whistle for Illi-

nois Northern Railroad, two whistles for east wye, three whistles for west wye.

Trains on eastbound main tracks: One whistle for going through, two whistles for Corwith Yard.

Trains on westbound main track: One whistle for through, two whistles for Corwith Yard.

Trains going south on Illinois Northern Railway: One whistle for Corwith Yard.

Trains going east on westbound main track: Three whistles; to Corwith Yard, four whistles.

Trains going west on eastbound main track: Three whistles for going through; four whistles for Corwith Yard."

Lead Tracks.

The tracks for about a block north from the Yardmaster's office are known as lead tracks, and numerous tracks diverge therefrom. (Ex. 2, Rec., 13, 25.) The switchtenders who throw the switches controlling the movement of cars between the switch tracks and the lead tracks are located near his office. (Rec., 24.) In the operation of the yard it is necessary for switch engines, with cars attached, to use the lead tracks north of his office almost continuously, except, of course, when trains are entering or leaving the yard over the lead tracks. (Rec., 25.)

Relations and Telephone Conversations between Yardmaster and Towerman concerning Movement of Trains over Lead Tracks and Crossing.

The Yardmaster, when he has trains going out of the yard, reports that fact to the Towerman. (Rec., 22, 23.) The Towerman is under general instructions to let everything go. (Rec., 27.) He, of course, is compelled to give superior trains the right of way and not block the main lines. (Rec., 28.) Passenger trains are superior to freight trains. If a Santa Fe freight train, which often-

times is a mile long, started to pull out of the yard across the Alton main line, and an Alton passenger train was expected soon, the Towerman would not let the freight train across. On the other hand, if it was simply a switch engine with one or two cars that wanted to go across, he might permit it to move.

Before the Towerman lets a train into the yard, he wants to know that the Yardmaster has a clear track to put it on. Otherwise, after the engine got over the crossing, the train would be stopped by the switches at the northerly end of the yard, under control of the Yardmaster, and would block the crossing. (Rec., 25.)

It was common practice (Rec., 17, 20) for the Yardmaster to call up the Towerman when a road train or a switch engine was ready to go out of the yard and tell the Towerman about it. The Towerman then told him whether or not he could take care of the train at that time. If he could, the train was permitted to proceed up onto the lead tracks and over the crossing. If the Towerman could not take care of the train at that time, then the Yardmaster continued to use the lead tracks for switching purposes until the Towerman was ready to let the train cross, and kept the train south of his office.

It was also common practice for the Towerman to call up the Yardmaster when he had either a road train or a switch train to go into the yard and ascertain whether the Yardmaster could take care of the train promptly if he let it go over the crossing. If the Yardmaster could do so the Towerman let the train in, but if the Yardmaster had no clear track to receive it then the Towerman held it on the main line so as to avoid blocking the crossing. (Rec., 25.)

The rules required that a train in the yard must be

absolutely under control and prepared to stop within range of vision. (Rec., 29.)

While it was common practice for the Yardmaster and Towerman to have these communications (Rec., 28), it did not happen in all instances, and in most cases, after such communications, trains going out of the yard gave the whistle signals above set forth. (Rec., 28.)

At times the incoming trains gave the Towerman the proper whistle signals, and he, when there was no Alton train due, gave them the proper signal, and, by means of the interlocking plant, threw the switch so as to let them into the yard, and they would proceed into the yard, providing the switchtenders had thrown the proper switches so as to give them a clear track when they got into the yard. (Rec., 28.) This was just as safe an operation as if there had been telephone information exchanged. If the tracks had not been clear, and the switches had not been thrown, they would simply have stopped the train and blocked the crossing, and would tie up the Alton main line and delay trains. (Rec., 25.) Any trains on those main lines would not come up and run into the train which was blocking the crossing because the derails connected with the interlocking plant and the signals located on each side of the tower would have been a complete protection.

On occasion also, outgoing trains proceeded onto the lead track and whistled to the Towerman for a proceed signal, and the manipulation of the proper crossing switch to go forward on the track they wished to take without any previous communication between the Towerman and the Yardmaster. If trains were due which might want to use the main line before the outgoing trains could get across, the Towerman would not let them proceed, and during the time he held them up, yard

operations would be at a standstill because the switch engines could not use the lead tracks.

Likewise, it was important for the Yardmaster to know what trains would arrive and the number of cars and character of freight in each, and when they would arrive so he could arrange his work accordingly. With this end in view, when the Yardmaster at Eighteenth Street sent a switch train down to the Corwith Yard he would call up the Corwith Yardmaster and give him that information and the dispatcher at Chillicothe also gave the Yardmaster the same information as to trains from the west. (Rec., 17, 18, 20.)

YARDMASTER AND TOWERMAN INDEPENDENT OF EACH OTHER.

> "The Yardmaster has no jurisdiction over the Towerman, or the Towerman over the Yardmaster." (Rec., 29.)

The dispatcher with reference to outgoing trains sends his orders through the telegraph operator at the Corwith station, located a few hundred feet south of the Yardmaster's office, which is at the north end of the yard. (Rec., 15.) The Corwith tower is just about as far north of the Yardmaster's office as the operator's office is south of it. (Map, Rec. 13.)

The Yardmaster testifying for the Government (Rec., 15) said:

> "I have no orders to give to road trains. The dispatcher handles his trains with written orders, which are given to road trains before they start out of the yard."

The trains coming into the yard were controlled by the Corwith Towerman who was (Rec., 27) "under the Superintendent of Terminals of the Chicago and Alton Rail-

road Company." The Yardmaster, still testifying, said (Rec., 22, 23):

> "The Corwith Towerman was under the jurisdiction of the Chicago and Alton. He was not under my jurisdiction or subject to my orders. When I wanted to get a train out of the yard lively or something like that, I would call him up. As to whether he would let the train out or not was a matter for him to determine.
>
> If a train approaching the interlocking plant wanted to go east, it would whistle twice, and if it wanted to go west it would whistle three times. The Towerman then determined whether the board should be given or not. I had no control or power over him to tell him to give them the board or not to give them the board. • • •
>
> Whether he would let the train in or not depended on his judgment and not mine, except that I had room for it.
>
> Mr. Drennan: Q. Now, under whose directions and orders would he let them in after you had given the information that there was room for it?
>
> A. His own."

Conversations Over the Telephone.

It is desirable, as we have already said, for the Yardmaster to know, when trains are going out of the yard, whether or not the Corwith Towerman will let them move promptly over the crossing. For the same reason it is also desirable for the Towerman to know before he sends a train into the yard that the Yardmaster has a clear track to put it on. Otherwise, the main line crossing would be blocked or the lead tracks would be occupied and the switching operations in the yard brought to a standstill. To obtain information with reference to those conditions, communication was had between the Towerman and the Yardmaster over the telephone. (Rec., 25.)

These conversations were of two kinds, namely, conversations relating to trains going out of the yard, and

to trains coming into the yard. The communications were, however, not essential or necessary to the movement of the trains in or out.

> "If the telephone was taken out of the Yardmaster's office, the business would go right on. I went to work in the north end of the Corwith Yard in 1894. They had no telephone connections with the tower at that time. Trains operated in and out of the yard on whistle signals as laid down in the Terminal Time-Card, just as they are now. They have never been changed. The telephone is simply a matter of convenience." (Rec., 30.)

The Yardmaster describes the reasons for these communications as follows (Rec., 25):

> "Trains coming into the yard have all the way from one car to a hundred cars. A train of 100 cars would be about a mile long—just the full length of the yard and would require a clear track for the entire length of the yard to pull it on. Otherwise it would block the C. & A. crossing.
>
> We use the lead tracks at the north end of the yard for switching purposes. We run back and forth there all day long, except when a train is coming into or going out of the yard. Then we must keep it clear.
>
> When we get information that a train is ready to come into the yard, we get our switch engines off the lead track at the north end of the yard.
>
> On the day when the B. & O. C. T. train came up and the Towerman told me it wanted to come into the yard, and I said to 'hold it off,' the reason for that was, we were so full we could not handle it at that time.
>
> The Towerman could have let the train come into the yard if he had wanted to without any danger to the train. It would have been stopped by the switches at the north end of the yard, but it would have blocked the C. & A. traffic. The effect of my statement was that if the train came in and it could not get by the switches, it would have blocked the C. & A. crossing. There was no room for it.
>
> Road trains get written orders from the telegraph

operator at the freight station. When they get their orders they are ready to go. I generally call up the Towerman when they whistle. If he says he cannot let them out, I don't let them start. I go out and give them a hand sign to stay where they are.

Some engineers would pull up to the board if it was set for them to stop and tie up the north end of the yard. The Towerman might hold them there 30 minutes, during which time we could not work. The reason I find out whether the Towerman can let them go by, is so that I can keep them from pulling up to the north end of the yard and blocking the tracks."

Rules.

The Government also introduced Rules 521 and 522 of the Book of Rules of the Operating Department of the defendant company, as follows (Trans., 22):

"Rule 521. At stations where a yard force is employed, all trains or engines without trains will be under the control of the Yardmaster, and all employees in trains or engines will be subject to his instructions. Road crews of trains entering such stations will be responsible for their respective trains or engines until the same are taken in charge by the Yardmaster or his representative.

Rule 522. Yardmasters are under the direction of the Trainmaster or Agent. They will have charge of the yard at stations where trains are made up, the movement of trains therein and of the entire yard force. They are responsible for the prompt movement of cars, the proper position of the switches, and the expenditious dispatch of trains within the limits of the yards."

Action Taken by Courts Below.

At the close of all the evidence the plaintiff moved for judgment in its favor, and the defendant moved the court to find and hold that there was no substantial evidence to support the allegations of the declaration and

to find the issues for the defendant and enter judgment in its favor.

The Court refused to grant the defendant's motions, to which it excepted, and over defendant's exceptions found and held that the defendant had violated the Act of Congress in question, as alleged in the declaration, and entered judgment against the defendant.

When the case was presented to the Circuit Court of Appeals it was contended by the plaintiff in error, as it was in the District Court, that the Hours of Service Act did not apply to Yardmasters, and that even if it did that there had been no violation of the act in that all train movements within the yard were controlled by verbal orders; that the train movements involved in this case were not those within the yard; that the Yardmaster did not control the movement of trains coming into and going out of the yard; that no *orders* were given over the telephone with reference to such movements; and that the only communication over the telephone with reference to such movements consisted of the giving and receiving of *information* and not *orders*.

The Circuit Court of Appeals stated the facts about the incoming and outgoing trains as follows:

> "When the Towerman wanted to send a train into the yards, he phoned the Yardmaster over a wire used for that purpose and so *informed* him. If the tracks in the yards were sufficiently clear to admit the entry of the train, the Yardmaster would reply, 'Let her come.' If the tracks in the yard were full, the Yardmaster would so advise the Towerman, or as illustrated in the record, he would say, 'Let her follow up No. 39.'
>
> In sending out trains from the yard a similar practice prevailed. The Yardmaster would *advise* the Towerman over the phone that he had a train 'made up' ready to 'go out.' The Towerman would reply, 'Let her come,' or 'Hold her until I get No. ..... out of the way,' depending upon the condition of the tracks outside the yards, etc."

The Circuit Court of Appeals held that this showed that *orders* were given and received between the Towerman and the Yardmaster over the telephone concerning the movement and operation of these trains, and that the communications between them did not constitute *information* as contended for by the plaintiff in error. In doing so the Court said:

> "The testimony in the present case does not permit of a conclusion which recognizes the communications that pass between the Towermen and Switchmen merely as information. The communications that were received or delivered over the telephone were 'orders' which the receiving party was not at liberty to ignore. They dealt with the movement and operation of trains. Their form—whether in the nature of a command or worded as a request, is not at all determinative of the question.
>
> Our decision is based upon the conclusion we have reached respecting the nature and necessary effect of the directions which passed between these two employees of the company. We think they were 'orders' within the meaning of the statute."

The Circuit Court of Appeals therefore affirmed the judgment of the lower court.

SPECIFICATIONS OF ERRORS RELIED UPON.

I.

The Circuit Court of Appeals for the Seventh Circuit erred in construing the Hours of Service Act in that it held that the Yardmaster of the plaintiff in error was an "operator, train dispatcher or other employee" within the meaning of the statute.

II.

The Circuit Court of Appeals for the Seventh Circuit erred in holding that the telephone messages that the Yardmaster received or transmitted were "orders" within the meaning of the statute.

III.

The Circuit Court of Appeals for the Seventh Circuit erred in holding that the Yardmaster was employed at a "place" within the meaning of the statute.

IV.

The Circuit Court of Appeals for the Seventh Circuit erred in holding that the Yardmaster was an "operator, train dispatcher or other employee, who by the use of the telephone or telegraph dispatches, reports, transmits, receives or delivers orders pertaining to or affecting train movements."

V.

The Circuit Court of Appeals for the Seventh Circuit erred in holding that the character of work performed by the Yardmaster in this case brought him within the Hours of Service Act.

VI.

The Circuit Court of Appeals for the Seventh Circuit erred in holding that the Yardmaster in this case was on duty at a post of duty prohibited by the Act of Congress with reference to hours of service.

VII.

The Circuit Court of Appeals for the Seventh Circuit erred in affirming the judgment of the District Court of the United States for the Northern District of Illinois, Eastern Division.

VIII.

The Circuit Court of Appeals for the Seventh Circuit erred in refusing to reverse the judgment of the District Court of the United States for the Northern District of Illinois, Eastern Division.

BRIEF OF ARGUMENT.

May it please the Court:

This Case Differs from Previously Decided Cases.

In only one other case has the Government seen fit to bring a prosecution against a railroad company for permitting Yardmasters to work more than nine hours a day. In that case, *United States* v. *Pennsylvania Railroad Company*, 239 Fed. 576, the Government was successful, but the facts were entirely different.

There, the Yardmaster *telephoned* instructions to switchtenders and signalmen, who were under his jurisdiction, and who set the signals and switches that governed the movement of trains over the main lines, which were located parallel with and adjacent to the yard and frequently were used for yard work. The following quotation from the opinion (see pp. 578, 579), makes that clear:

> "There are also tracks which extend through the yard without being in the strict sense part of it. Two of these are main tracks used for passenger service having nothing to do with the yard. These others (two known as westbound, and one as eastbound) are used for freight service, which goes through the yard without being of the yard operations. These three tracks are, however, also used for yard movements (as also are at times even the passenger tracks), and are so used at times without regard to the indicated intended direction of travel. This latter movement is called 'bucking the track.'
> * * *
>
> To aid and inform such operators of trains, and enable them to regulate and control such movements, the Yardmasters are given certain duties to perform and certain instrumentalities to assist them. Structures or buildings are provided at convenient points

at which the Yardmasters are stationed. These buildings, when necessary, are equipped with telephones and speaking tubes, and the Yardmasters are given the assistance of clerks and switchmen or signalmen. * * *

They direct what track is to be used and the signal is set accordingly. * * *

The telephone is used by the Yardmasters, although they may give the message in other ways and frequently do so."

That case never reached this Court. This Court has not construed this act with reference to Yardmasters.

The distinction between that case and this one is obvious. In that case the Yardmasters controlled the movement of trains operating in the yards and did so by telephone orders issued to switchmen.

In the case at bar, train movements at the place in question are controlled by the Towerman. The pertinent use which the Yardmaster makes of the telephone is to advise the Towerman that trains are made up and ready to leave the yard, or that there are tracks ready to receive incoming trains. Even when the Yardmaster informs the Towerman that there is a train made up and ready to leave the yard, he, the Towerman, exercises his own discretion whether the train should be allowed to run out on the main tracks at the particular time. (Rec., 23, 27.) He will not permit it, if there are other desired uses of the tracks known to him but of which the Yardmaster has no information. If the Yardmaster telephones that there is room in the yard for an incoming train, the Towerman still will not let the train pass the tower unless the other movements on the track permit it to be done.

In short, the Yardmaster uses the telephone in this business merely to inform the Towerman of a condition which the Towerman considers with the other information and knowledge of the situation in his possession.

When he throws a signal or a switch, or permits a train to pass, it is not because of the information given by the Yardmaster, but because of his larger knowledge of the movements of trains on the tracks controlled by the levers of the tower.

The train movements are controlled by the Towerman who acts on his personal observation. He also controls the switches at the entrance to this yard. If the Yardmaster erroneously telephones that a train is ready to leave the yard, no danger of an accident can result as the Towerman will or will not throw the switch, as he personally decides the movement based on his observation. If the Yardmaster erroneously telephones that there is room for a train in the yard, no accident can result therefrom because again it is the Towerman who will control not only the train about to enter the yard, but all other trains desiring movement on the tracks; and he controls them from his personal observation. A modern electric interlocking plant such as this protects all trains on a crossing and makes one-way traffic compulsory.

The only case passed on *by this Court* involving a claimed violation of this act, and at all analogous to this case, is *C. & A. R. R. Co.* v. *United States*, 247 U. S. 197. That case involved a switchtender, as this Court said, "on duty for twelve consecutive hours, in a shanty continuously operated night and day, where, by the use of the telephone, he received and delivered orders pertaining to train movements—not mere switching movements within the yard; and in such service mental and physical alertness are of great importance."

In the instant case the Yardmaster was not "on duty for twelve consecutive hours in a shanty" or any other place "where, by the use of the telephone, he received

and delivered orders pertaining to train movements." He had no such "post of duty" or "character of work."

Moreover, the case at bar is essentially different from the case of *C. & A. R. R. Co.* v. *United States*, 247 U. S. 197, in that the switchtenders were on duty in a yard at Bloomington, Illinois, 7¾ miles long, through which, for the full distance of 7¾ miles, the through trains of the Chicago & Alton Railroad Company were operated, and it was with reference to the operation of those through trains through that yard that that suit was brought, the movements of which through the yard were controlled by the Yardmaster, who telephoned orders as to such movements to the switchtenders in the yard. In that case it was stated by this court:

> "Trains operated over this portion of the line are under control of the Yardmaster and subject to a rule which provides 'all trains will reduce speed on passing through yard limits and proceed only after the way is seen or known to be clear.' Each of these shanties was continuously operated night and day by two men alternately on duty therein for twelve hours during each twenty-four. • • • Each of said shanties was equipped with a telephone, all three being on the same circuit and connected with the Yardmaster's office • • • The work of these employees is to throw switches, relieve yard, train and engine crews of this work, and to avoid delays to trains moving through the yard."

In the case at bar the Corwith Yard, in which the Yardmasters worked, is a yard wholly separate and apart from the main line of the railroad. *No through trains went through it and the Yardmaster and the switchtenders and other employees of the plaintiff in error working under them had nothing to do with through trains of the plaintiff in error, but only had to do with switching movements within the yard.*

In the case at bar through trains go by the yard

which is located at right angles to the main line, and, furthermore, the Yardmaster does not telephone to his crews which are in charge of the switch engines, or to his switchtenders who throw the switches and set the signals, or to the crews of road trains which pull into and out of the yard. *All such directions are given verbally or by hand signs.*

The switchtenders are under the jurisdiction of the Yardmaster, and on the defendant's railway all employees in train or engine service are subject to instructions of the Yardmaster while in the yard, as was the fact in the *Pennsylvania* case. If the Yardmaster in the instant case had telephoned to any of the employees above specified, and as a result of such telephone communications, trains were run over any particular track, this case would have been somewhat similar to the *Pennsylvania* case and the case of *Chicago & Alton Railway Company* v. *United States*, 247 U. S. 197, except as to the location of the yard.

In the yard involved in the *Chicago & Alton* case *telephones were installed between the Yardmaster's office and the shanties of the switchtenders who threw the switches which governed the movement of through trains on the main lines alongside the yard.* The switchtenders then transmitted the orders of the Yardmasters to train crews verbally, or by hand signals, and, of course, they set the switches. The question there involved was not the hours of service of the Yardmasters but of the switchtenders, and the latter were held to be within the Hours of Service Act. *Furthermore, that case involved movement of trains through and not within the yard.*

This case is, therefore, inherently different from both of these cases, and cannot be governed thereby.

THREE QUESTIONS ARE INVOLVED IN THIS CASE. THEY ARE AS FOLLOWS:

I.

DID THE CIRCUIT COURT OF APPEALS PROPERLY HOLD THAT THE RULE EJUSDEM GENERIS SHOULD NOT APPLY IN THE CONSTRUCTION OF THIS ACT?

II.

WERE THE COMMUNICATIONS BETWEEN THE TOWERMAN AND THE YARDMASTER "ORDERS" AS DISTINGUISHED FROM "INFORMATION"?

III.

DID "THE POST OF DUTY" OF THE YARDMASTER BRING HIM WITHIN THE ACT?

We will discuss these questions very briefly in the above order.

I.

DID THE CIRCUIT COURT OF APPEALS PROPERLY HOLD THAT THE RULE OF EJUSDEM GENERIS SHOULD NOT APPLY IN THE CONSTRUCTION OF THIS ACT?

It is needless in the discussion of this question to do more than remind your Honors of the general and elementary rule that where general follow specific terms that the general terms are limited by the specific terms, and do not enlarge the meaning thereof or include any-

thing outside of the class or classes described by the specific terms. (Lord Tenterden's Rule: *United States* v. *Mescall*, 215 U. S. 26.)

In the case of *Missouri Pacific Ry. Co.* v. *United States*, 211 Fed. 893, the Circuit Court of Appeals for the Eighth Circuit applied this well known rule of construction to the language of this act, and held that switchtenders were not within the act because they were not of the same class of employees as train dispatchers or operators.

No one can properly contend that, applying the rule of *ejusdem generis*, a Yardmaster would come within the same class of employees as train dispatchers or operators. In fact, the District Court of the Eastern District of Pennsylvania, in the case of *United States* v. *Pennsylvania R. R. Co.* 239 Fed. 576, at page 580, expressly held that *Yardmasters* would not come within the statute if this doctrine of *ejusdem generis* be applied. That court there said:

> "The argument addressed to us by counsel for defendant is convincing so far as the character of the employees is involved. We are in entire accord with him that Yardmasters do not belong to the class of dispatchers or operators who have to do with train movements. If the words 'other employees' are to be given this significance, we think the viewpoint of the defendant to be the correct one. Much may be said in support of this. It is a resulting consequence of the *ejusdem generis* doctrine."

We assert that the statute should be so construed. The pleader who drafted the declaration in this case seemed to recognize that this is true. The Yardmasters involved were alleged not only to be employees, but "*operators.*" (Rec., 3, 4, 5, 6.)

The Circuit Court of Appeals for the Seventh Circuit, however, has refused to apply this rule of construction,

and in the case of *C. R. I. & P. Ry. Co.* v. *United States*, 226 Fed. 27, held that switchtenders (p. 30) "whose duties *primarily* involved the use of the telegraph and telephone in connection with" orders relating to the movement of trains and who "were *regularly* stationed at the shanty in which the telephone was located," and whose "duty to transmit the information by telephone to the Gresham leverman was not *incidental* but *regular* and *habitual*" came within the act, although "it was not, however, in any sense their principal and primary duty; that was to attend to the Blue Island freight yard switches."

In that case the test applied was not the rule of *ejusdem generis*. That rule of construction was rejected, and it was held that there was embraced within the act any "employee who ordinarily and habitually uses the telegraph or telephone for the purposes stated."

The same ruling was made by that court in the case of *C. & N. W. Ry. Co.* v. *United States*, 226 Fed. 30.

In the later case of *C. & A. R. R. Co.* v. *United States*, 244 Fed. 945, that same court held that *switchtenders* came within the act. In that case the question of the construction of the statute with reference to the doctrine of *ejusdem generis* was not discussed, but the court referred to its former decisions in the cases of *C. R. I. & P. Ry. Co.* v. *United States*, 226 Fed. 27, and *C. & N. W. Ry. Co.* v. *United States*, 226 Fed. 30, as decisive of what employees came within the act.

That court applied the same tests as it had in the former cases and held that—

> "This use of the telephones by the switchtenders in connection with the movement of the trains was not occasional or exceptional, but was part of their general and usual duties; each train movement so communicated to the crews or participated in by the switchtender being preceded by his reception of a telephoned order directing it."

That case was brought on writ of error to this Court, where it was decided and reported as *C. & A. R. R. Co.* v. *United States,* 247 U. S. 197. This Court in its opinion used this language:

> "The individuals within the ambit of the proviso's pertinent provisions are marked *by the nature of service performed*—an 'operator, train dispatcher, or other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements.' And the railroad is forbidden to permit one performing such service in 'towers, offices, places, and stations continuously operated night and day' to remain on duty therein longer than nine hours in twenty-four. *Both the post of duty and character of work are essential elements.* If, in due course of his work, an employee while *in any* of the *locations* specified uses the telegraph or telephone for sending or receiving messages concerning train movements, he may not lawfully remain on duty *therein* exceeding *nine* hours during any twenty-four-hour period, except in case of emergency.
>
> Here, the facts disclose the switchtender on duty for twelve consecutive hours *in a shanty* continuously operated night and day where, by the use of the telephone, he received and delivered orders pertaining to train movements—not mere switching movements within the yard; and in such service mental and physical alertness are of great importance. By permitting this the railroad violated both language and purpose of the act."

It is apparent that it was not *expressly* decided by this court in that case that the doctrine of *ejusdem generis* should not be applied in the construction of this statute. In addition, all that that case does, is to hold that those particular switchtenders come within the act. *It by no means is an authority that these Yardmasters do.* The switchtender there involved may in fact have been *an operator or train dispatcher*—a thing these Yardmasters could not by the wildest imagination be held to be.

We desire in this case to squarely present to the court the question as to whether or not the rule of *ejusdem generis* should be applied to this statute. If it be applied, of necessity Yardmasters are not within the class referred to in the statute.

We most respectfully assert, from the language used in the act, that Congress in enacting this statute, had in mind the particular class of employees who were confined to a room or desk, in and at which they were compelled to continuously remain during the time they were receiving or transmitting orders over the telephone, and that this particular class of men being subjected to work of this kind should not be compelled to work any longer than nine hours.

To use the language of the court in the case of *United States* v. *Pennsylvania R. R. Co.* 239 Fed. 576, the act was intended to be limited (p. 578) "to a class who were, because of the character of their employment, required to be mentally alert and wide awake, and were most likely to succumb to the strain of long hours *because they would be without the physical activity which would keep them alert and on the move.*"

We submit that there is no more reason for the statute applying to a Yardmaster than to a train conductor, who, confessedly, would not be within the proviso, and who was expressly held in the case of *United States* v. *Florida East Coast Ry. Co.* 222 Fed. 33, not to be included therein.

There must be some limit to the application of this statute. That limit we assert should be that which exists by the application of the rule of *ejusdem generis.* We insist that that rule should be applied to the construction of this statute. If it is, Yardmasters most certainly do not come within the act.

II.

WERE THE COMMUNICATIONS BETWEEN THE TOWERMAN AND THE YARDMASTER "ORDERS" AS DISTINGUISHED FROM "INFORMATION"?

The facts with reference to the communications, over the telephone, between the Towerman at Corwith tower and the Yardmaster, are set forth in the statement of the case. There is no necessity of our repeating them here. The evidence shows that the Towerman had complete control of the trains going into and coming out of the yard. The fact that the Yardmaster had complete control of the trains *within* the yard is of no significance for two reasons—first, the case is not based upon any movements of that kind, and second, movements wholly within the yard would not be train movements. (*United States* v. *Pennsylvania R. Co.* 239 Fed. 576.)

Our contention, with referencee to this part of the case, is that the Towerman having complete control of trains going into and coming out of the yard, telephoned the Yardmaster only to obtain *information* with reference to the condition of the yard, as to whether or not trains could be received in the yard, and that the Yardmaster, not wanting his lead track filled by a standing train, only telephoned the Towerman with reference to outgoing trains to give the Towerman information as to their going out.

It is like the case of a conductor of a freight train, who is to put his train in a yard, where there is no Yardmaster, and must obtain information as to the condition of the yard and on what sidetrack his train can be placed. If he should send forward a brakeman to ascertain the condition of the yard, and the brakeman should telephone to the conductor the information, the brakeman in

doing so could say to the conductor over the telephone "hold her—the yard is full," or could simply say "hold her,"—that would indicate to the conductor that the yard was full and that the train could not be sent forward until some other movements were made in the yard, but it surely would not be giving an "*order*" over the telephone.

The distinction between "*information*" and "*orders*" is well brought out in the case of *United States* v. *Pennsylvania R. Co.* 239 Fed. 576, where the court said (p. 577):

> "The risk which Congress had in mind to minimize is one flowing from the wrong moving of trains, resulting in collisions or other causes of injury to persons and property. Such movements could be made only at the will of some employee. In the final analysis this would be the engineer or other operator of the mechanism, but, as he moves at the direction of some other employee, without exercising any other will of his own than that of obedience, the 'order' to move, of which we are in search, comes from such other employee. This other employee, in his turn, does not act, except upon knowledge of the conditions, and this he gathers from information conveyed to him by still others. There is here a distinction. As before observed, there must be a mind which directs the movement. Whenever this is manifested, there is an order to move. *The distinction is between the information upon which the mind acts and the act.*
>
> There are times when the two are difficult to distinguish, and the one blends into the other, and each becomes both. Take the instance of a train run on schedule and by the block signal system. *The signal is both information and an order to the engineer.* If it is not against him, it tells him the track is clear, and orders him to run to the next block. If some one, not a signalman, stands on the track waving a flag or his hat, the engineer will stop the train; *but this could not be said to be an order to stop.* The distinction and the difference and the test are here alike obvious, assuming the general orders to be that the engineer must obey

the signal. Where the brakeman of a stalled train goes back to signal a following train, or a switchman waves to the engineer after throwing a switch, the distinction remains, and the test is the same, but the difference practically disappears. Railroad parlance supplies us with the required phrase—the brakeman is said 'to flag' the train. Another illustration is afforded by a station agent, who informs the engineer that a train ahead of him is in difficulties and may become stalled. Still another is afforded by the rule (not in the Book of Rules) put in evidence by the defendant and relied upon to support the defense. This rule informs those in charge of the train that it is likely to meet other trains within yard limits, and orders them to so run their train as that it may be stopped within the range of their vision.

The test, of course, is whether, in the cases instanced, the engineer uses his own judgment upon the information given, or whether he is without choice, and has no discretion in respect to what he will do. Practical railroading recognizes the distinction and classifies employees accordingly. Dispatchers and operators of block signal towers are recognized as those who *direct*, and because of this give 'orders' for train movements. *Switchmen and brakemen do not give 'orders.'* Congress, wishing to apply the act, not only to those who in the railroad sense directed train movements, but also to those through whose acts trains did in fact move, designated 'dispatchers' and 'operators' *eo nomine*, and added all employees whose duty it was to give information which pertained to or affected train movements, through being the practical equivalent of an order. It was at once seen, however, that if the enactment was so phrased the language was entirely too broad and general, and it was because of this limited to those who *conveyed* the information by telegraph or telephone. There were several reasons for a limitation of this kind. One was that it defined the class with practical precision, and excluded employees not meant to be embraced, because it was impractical to embrace them. *Another was that this limitation confined the act to a class who were, because of the character of their employ-*

ment, required to be mentally alert and wide awake, and were most likely to succumb to the strain of long hours, because they would be without the physical activity which would keep them alert and on the move. This gives us the fair meaning of the act of Congress, and it only remains to apply that meaning to the employees with whom we are now concerned."

There can be no doubt but that that case correctly sets forth the difference between *orders* and *information.*

Applying this reasoning to the case at bar it will be seen that the conversations between the Towerman and Yardmaster were not orders, but information.

The Towerman, as he testified, and was shown by one concrete instance, notwithstanding the fact that the Yardmaster did tell him to let a train in, exercised his own judgment as to whether he should do so, he being, of course, at all times, under general instructions to keep traffic moving.

The Circuit Court of Appeals for the Seventh Circuit, in deciding the case at bar, recognized that the *form* of the communication "is not at all determinative of the question" as to whether or not the communications between the Towerman and the Yardmaster were or were not orders. In this the court was undoubtedly right—but the court, in determining whether the communications were or were not "orders," applied improper tests and as a result thereof made, as we claim, the erroneous findings that it did.

The court said with reference to the question as to whether these communications were orders or information:

> "The testimony in the present case does not permit of a conclusion which recognizes the communications that pass between the towermen and switchmen merely as information. The communications that were received or delivered over the telephone

were 'orders' which the receiving party was not at liberty to ignore. They dealt with the movement and operation of trains. Their form—whether in the nature of a command or worded as a request, is not at all determinative of the question.

Our decision is based upon the conclusion we have reached respecting the nature and necessary effect of the directions which passed between these two employees of the company. We think they were 'orders' within the meaning of the statute."

The Circuit Court of Appeals erred in this. The test by the court applied in determining whether the communications were or were not *orders* was not whether the receiving party had to *obey* them, which, if they were *orders*, he was under the necessity of doing, but was whether or not the communications received over the telephone were such that "the receiving party was not at liberty to *ignore*." This would apply equally as well to information. Of necessity the receiving party, whose acts depend upon *information* obtained over the telephone, is "not at liberty to *ignore*" the information thus received. It is his duty to obtain the information and *act* on it. "The distinction is between the *information* upon which the mind acts and the *act*." (*United States* v. *Pennsylvania R. Co.* 239 Fed. 576.) As the Towerman said (Rec., 27):

> "After I get information from the Yardmaster or any source that may be available, I act on my own judgment as to whether I shall give the engineer the board or not."

The court most certainly applied the wrong test in determining whether the communications were information or orders. That of necessity is a question of law and not of fact. This is also shown by the fact that the court seemed to think that the fact that the communication "dealt with the movement and operation of trains" was controlling. The mere fact that the *information* obtained "dealt with the movement and operation of

trains" is certainly not controlling, and does not show that the communications were "*orders.*" The Act of Congress covers only "*orders*" and not "*information*" pertaining to or affecting train movements. The Circuit Court of Appeals is certainly in error in this holding.

Analysis of Telephone Conversations.

As appears from our statement, practically all of the conversations of the Yardmaster were with the Towerman at the Corwith Tower, although conversations also were had with the Yardmaster at 18th Street, the Ash Street Towerman, and the telegraph operator at the Corwith freight station, some 400 feet south of the Yardmaster's office.

We shall now analyze those various conversations for the purpose of ascertaining whether any of them constituted the receipt or transmission of train orders.

Conversations Between Yardmaster and Towerman at Corwith.

These conversations were of two kinds, namely, conversations relating to trains going out of the yard and to trains coming into the yard. We shall first take up the conversations concerning outgoing trains.

Outgoing Trains.

The first conversation in regard to an outgoing train took place at 6:45 a. m. July 7th, and is detailed by the Yardmaster. (Rec., 17):

> "The Witness: Called Corwith tower; Local is ready to go west.
>
> The object of that was to get the train across the lead tracks at the north end of the yard without blocking anything, and not letting the train pull up to the board until the Towerman would give them the

signal, which would permit the train to pull out across the C. and A. to the main line of the Santa Fe. That was a local freight train. *Under our practice, before I would send a local out, the Towerman would advise me over the telephone that it was all right to let it go.*"

The general run of such conversations were like the one at 6:45 a. m., July 8th (Rec., 18), as follows:

"At 6:45 a. m. July 8th, 1921, I called the Corwith Tower, and said 'Local is ready to go.' The Towerman said, 'Let her come,' and I let her go."

In regard to conversations concerning outgoing trains the Yardmaster further testified (Rec., 22-23):

"The Corwith Towerman was under the jurisdiction of the Chicago and Alton. He was not under my jurisdiction or subject to my orders. When I wanted to get a train out of the yard lively or something like that, I would call him up. *As to whether he would let the train out or not was a matter for him to determine."*

He also stated:

"On July 7th, at 1:42 p. m., when I had a conversation with the Corwith Towerman about an Illinois Northern train, it was on a track about 50 feet from my office. Between where it was standing and the tower, there are switches under the control of the switchtenders. If the Illinois Northern engine went up close to the tower on the lead, it would stop us from switching. I did not want the train to go up there until I was sure the operator would let it go out of the yard." (Rec., 24-25.)

"I am under general instructions to let all trains in or out of the yard. I do not need any instructions from the Towerman to let trains out of the yard." (Rec., 26.)

The Towerman, with reference to outgoing trains, said:

"The Yardmaster does not always call me up when trains go out of the yard. I get the whistle signals and I give them the board." (Rec., 28.)

From the above and foregoing it clearly appears that the reason that the Yardmaster called up the Towerman was not to get an order but to secure information. If the yard crews did not want to use the lead tracks between his office and the crossing, he permitted outgoing trains to pull up there and wait until the Towerman would let them across. If he wanted the lead tracks kept clear, he would not let the outgoing trains pull up on to the lead tracks until he knew the Towerman would let them go over the crossing.

Incoming Trains.

The evidence relating to the first one of these appears at the bottom of page 17 of the transcript, as follows:

"Q. Taking the telephone conversation at 10:25 a. m., what was that?
A. Tower called; said extra 3164 from west.
Q. What did you say then?
A. I said, 'Let it come.'
Q. Did it come?
A. No, it did not come.
Q. What became of it?
A. Corwith tower called back at 10:26.
Q. One minute later. What did they say then?
A. Said he would have to hold extra 3164 for C. & A. No. 1.
Q. What was C. & A. No. 1?
A. A passenger train.
Q. What did you tell Corwith Towerman?
A. I said all right."

The following conversation, as detailed by the Yardmaster (Rec., 20), took place on July 8th:

"At 4:50 p. m. the Corwith Tower reported B. & O. C. T. with 40 cars. That train was making a delivery to our yard. I said to the Towerman, 'Hold him until we notify you,' and it was held. * * *

At 5:20 p. m. I called the tower and said, 'let B. & O. C. T. in,' and the Towerman let them in. That was the same train I notified the Towerman at 4:50 to hold until I notified him."

Upon cross-examination he said (Rec., 25):

"On the day when the B. & O. C. T. train came up and the Towerman told me it wanted to come into the yard, and I said to 'hold it off,' the reason for that was, we were so full we could not handle it at that time.

The Towerman could have let the train come into the yard if he had wanted to without any danger to the train. It would have been stopped by the switches at the north end of the yard, but it would have blocked the C. & A. traffic. The effect of my statement was that if the train came in and it could not get by the switches, it would have blocked the C. & A. crossing. There was no room for it."

In regard to the same conversation the Towerman, upon cross-examination by the Government said (Rec., 28):

"Q. Take this B. & O. C. T. train; I will call your particular attention to it. Mr. McCollom said you reported B. & O. C. T. train with 40 cars, and that he told you, he said, 'Hold him there till I notify you.' Did you consider that an order to hold that train, or did you think you could send it in regardless of what Mr. McCollom told you?

A. Well, in a way it was like an order.

Q. Yes.

A. *But I guess I had the option of using my own judgment on that order.*

I have never let a train go into the yard when the Yardmaster told me to hold it. I always let them go in when he tells me to let them come if I can do so without delaying a superior train. The Yardmaster does not always call me up when trains go out of the yard. I get the whistle signals and I give them the board.

I do not always call up the Yardmaster when a train is going into the yard. It depends on whether there is a C. & A. train due soon. *If there is plenty of time I just let the trains in on him. He had information they were coming and he was responsible for taking care of them.* They could not go on into the yard if the switches were against them. I do not have anything to do with the yard switches."

In regard to the same conversation, defendant's Superintendent also testified, upon cross-examination by the Government (Rec., 31):

"Q. Well, take the item where the B. & O. C. T. train was coming into the Corwith Yard, and the Towerman at Corwith Yard called up Mr. McCollom and told him he was ready to send that train in, and Mr. McCollom told him to hold that train; what would you call that?

A. *I would call that information.*

Q. Then, you understand that when Mr. McCollom told the Towerman to hold that train, that Towerman would have a right to send the train in regardless of what Mr. McCollom said?

A. Yes, sir."

On redirect he stated (Rec., 31):

"Q. Well, have or haven't Towermen general instructions as to not sending a train into the yard that cannot receive it?

A. General instructions provide that before they can make a move of that kind they must ascertain that it is not going to tie up the railroad and be governed then accordingly.

Q. As far as safety goes, the train could go in there?

A. As far as safety goes, that doesn't enter into it. It is simply a matter of not blocking up the yard.

Mr. Drennan: Q. But if a Towerman can see that the yard is open and safe, he does not need to ask anybody, does he?

A. No."

From the above it appears that the conversations between the Yardmaster and the Towerman relating to incoming trains are substantially the same as those relating to outgoing trains. The Towerman usually, but not always, calls up the Yardmaster and tells him he has a train for the yard. The Yardmaster, who is kept advised of probable train arrivals, generally tells the Towerman to let it come, but in case he has no clear track

he may say to hold it. He is simply giving the Towerman information as to the state of the yard. In substance, the Yardmaster says to the Towerman, that if the latter permits a train to come over the crossing he will or will not allow it to enter the yard.

The Towerman can, if he chooses, let the train come in any way, with perfect safety, and when there is no C. & A. train about due he will let an incoming train go over the crossing, regardless of whether the Yardmaster can take care of it or not, because it is the Yardmaster's business to take care of trains which come into the yard, and he assumes that the train will be taken care of within a short time after the engine pulls over the crossing.

If the Yardmaster tells him to let a train come, that does not mean the Towerman will do so, because in the case of the B. & O. train, after the Yardmaster told the Towerman to let it come, the Towerman decided to hold it up until passenger train No. 1 of the C. & A. had gone over the crossing.

In other words, he uses his own judgment and discretion as to whether he shall call up the Yardmaster or not and as to what action he takes after calling up the Yardmaster.

Conversations With Telegraph Operator at Corwith Freight Station.

The first such conversation took place at 6:29 a. m. July 7th, and was testified to by the Yardmaster, beginning at the bottom of page 16 of the transcript, as follows:

> "The Witness: Telegraph operator at Corwith called and said Extra 3173 would be in at 2 p. m. with 27 perishable.

The operator was located at the Corwith freight office, about 400 feet south of the Yardmaster's office. He handled train orders.

The purpose of his calling me up was to give me the consist of what was coming so I would know how to handle my power; whether to send an engine out of the yard or not. That information would help me to expedite the movement of trains in and out of the yard."

The other conversations with the telegraph operator were of the same tenor and effect. Their purpose was to advise the Yardmaster what was coming in so he could prepare to receive it and in no way can they be said to be orders, although we understand the Government contends they are.

Conversations With Ash Street Towerman.

The following conversations, as testified by the Yardmaster, took place between him and the Ash Street Towerman (Rec., 19):

"At 11:30 a. m. I called the Ash Street Tower and told him to run No. 14 over the I. C. tracks, west from Ash Street, shown on Government Exhibit 2, to the drawbridge, east thereof. The Towerman called me up and told me there was a broken rail there, and I made arrangements to get it to Chicago without blocking traffic any more than I could help. The Towerman said, 'O. K.'

* * * * *

At 11:43 a.m. I called Ash Street Tower and told him to run 2062 over the I. C. from Ash Street Tower and told him to run 2062 over the I. C. from Ash Street to the drawbridge because the Santa Fe track had a broken rail, obstructing traffic. The Towerman said he would do that.

* * * * *

At 12:22 p. m. I called Ash Street Tower and told the Towerman to let No. 14 down our main track as it was now O. K. for use. He said, 'O. K.' This

message countermanded my former message to run No. 14 over the I. C., because before the train got there the track was repaired."

In this case the Yardmaster acted under authority of Rule 7 (Rec., 21). This rule provides that the Terminal Trainmaster, or, in his absence, the Corwith Yardmaster, will take charge and handle trains when a track is obstructed. This action of the Yardmaster was not in the course of the performance of his regular or daily duties, as appears from his testimony (Rec., 24):

"Q. Now, referring to the telephone conversation with the Towerman at Ash Street, I believe you stated on direct examination that came up on account of a broken rail.

A. I think that was the cause of it.

Q. And that obstructed the line?

A. Yes, sir.

Q. And as I understand it in case of that kind you take charge and handle matters under the rules, is that correct?

A. Yes.

Q. That is under an emergency?

A. Yes.

Q. Do they arise very often?

A. Oh no; hardly ever."

We understand the Government does not contend that the action of the Yardmaster under the rule in case of emergency is a violation of the act. Under the authorities it was not.

In This Case No Telephone Orders Were Given to Switchtenders or Train Crews.

With respect to this the Yardmaster testified (Rec., 24):

"The switchtenders stay at or near my office. I give them their instructions verbally."

Also (Rec., 26):

"I don't give train crews any orders by phone or by telegraph. They are all verbal."

Defendant's Assistant Superintendent of Terminals, who was the Yardmaster for many years and whose office is now located in the yard, testified (Rec., 29):

"All orders given for the movement of cars, trains or engines in the yard, are given orally to the foreman who has charge of the various engines, or perhaps the switchtender or assistant Yardmaster."

Yardmaster Had No Jurisdiction Over the Corwith Towerman.

With respect to this matter the Towerman testified (Rec., 27):

"I am, and was, under the Superintendent of Terminals of the Chicago and Alton Railroad Company."

The Santa Fe Superintendent said (Rec., 30, 31):

"The Chicago and Alton operates the interlocking plant at the entrance to Corwith Yard. The Terminal Trainmaster is the boss of the Yardmaster. The C. & A. has no control over the Yardmaster. *The Yardmaster has no authority to give orders to the Towerman. They do give one another information and then each acts for his own road.*"

Defendant's Assistant Superintendent of Terminals testified (Rec., 29):

"The Yardmaster has no jurisdiction over the Towerman, or the Towerman over the Yardmaster. I do not have any jurisdiction over the Towerman myself. The talk between them is information in order that each may perform his duties in connection with existing rules."

The Yardmaster testified (Rec., 22-23):

"The Corwith Towerman was under the jurisdiction of the Chicago and Alton. He was not under my jurisdiction or subject to my orders. When I

wanted to get a train out of the yard lively or something like that, I would call him up. As to whether he would let the train out or not was a matter for him to determine."

The Towerman further testified (Rec., 27):

"The man I have the most conversation with is the Yardmaster. There are times when I think he gives me orders but probably it is only information. After I get information from the Yardmaster, or any source that may be available, I act on my own judgment as to whether I shall give the engineer the board or not.

Q. Mr. Haushalter, under the rules and practices you are supposed to let trains pull over your plant that come up there and give the proper signals, are you not?

A. *Yes, sir. If the Santa Fe Yardmaster tells me to let a train come ahead, I do not always do it on account of the fact that it might cause delays to other trains. I find out about the movement of trains from the Train Dispatcher, the Yardmaster and from Towerman on either side of me. I work for both companies.*"

It clearly appears from the foregoing that the Towerman exercised a discretion. It was his business to expedite traffic. He gathered information from every source he could; from the whistle signals of the engines and from the Yardmaster through his sense of hearing. Information as to the length of trains and the probable time they would take to go over crossing came to him through his sense of sight. When all the information from various sources was collected he then exercised his own judgment as to what he should do and as to what would be to the best interests of both his employers. He occupied much the same position as a traffic policeman who, by signals, gives orders governing the movement of traffic, but who does not receive orders, although in deciding what order he shall give, he does receive in-

formation through his sense of sight and from that information determines what shall be done to the end that traffic may be expedited.

The Yardmaster Was Not Under the Jurisdiction of the Corwith Towerman.

It appears in evidence that when the Yardmaster would tell the Towerman he had a train ready to go out, the Towerman would usually say, "Let it come," but this was not an order. The Yardmaster testified (Rec., 26):

> "I am under general instructions to let all trains in or out of the yard. I do not need any instructions from the Towerman to let trains out of the yard."

The reason the Yardmaster called up the Towerman in such instances clearly appears from his testimony (Rec., 24, 25):

> "On July 7th, at 1:42 p. m. when I had a conversation with the Corwith Towerman about an Illinois Northern train, it was on a track about 50 feet from my office. Between where it was standing and the tower, there are switches under the control of the switchtenders. If the Illinois Northern engine went up close to the tower on the lead, it would stop us from switching. I did not want the train to go up there until I was sure the operator would let it go out of the yard. Trains coming into the yard have all the way from one car to a hundred cars. A train of 100 cars would be about a mile long—just the full length of the yard and would require a clear track for the entire length of the yard to pull it on. Otherwise it would block the C. & A. crossing. We use the lead tracks at the north end of the yard for switching purposes. We run back and forth there all day long, except when a train is coming into or going out of the yard. Then we must keep it clear.
>
> * * *
>
> Road trains get written orders from the telegraph operator at the freight station. When they get their orders they are ready to go. I generally call up the Towerman when they whistle. If he says he cannot

let them out, I don't let them start. I go out and give them a hand sign to stay where they are. Some engineers would pull up to the board if it was set for them to stop and tie up the north end of the yard. The Towerman might hold them there 30 minutes, during which time we could not work. The reason I find out whether the Towerman can let them go by, is so that I can keep them from pulling up to the north end of the yard and blocking the tracks."

* * *

(Rec., 26):

"The orders given by the telegraph operator to the train crews of road trains give them the right to go out of the yard over the C. & A. crossing, but they cannot do that until the Towerman gives them the signal, and they cannot go out of the yard if I tell them to stay where they are, but if I don't do anything, and the Towerman gives them the signal, then they can go out."

It seems to us too obvious for argument that the Towerman would not give orders to the Yardmaster and equally clear that the Yardmaster would not give orders to the Towerman, and we believe that all must agree with the following testimony of the Yardmaster (Rec., 26):

"Q. Now what was the difference in effect between the Yardmaster or the Corwith Towerman calling you up and saying that a train was ready and you replying to him to let her come, and a report that you would send him that a train was ready to go out and he would say ,'All right.' What was the difference between those two messages, so far as their effect upon the movement of the train was concerned?

A. *There wasn't any, I should say.*"

It would seem from the record that both the Circuit Court of Appeals and the District Court erred in holding that these telephone communications were *orders* and not *information.*

III.

DID "THE POST OF DUTY" OF THE YARDMASTER BRING HIM WITHIN THE ACT?

It seems to us that the decision of this Court in the case of *C. & A. R. R. Co.* v. *United States,* 247 U. S. 197, above referred to, is conclusive of this question, and that under that decision "the post of duty" of the Yardmaster did not bring him within the act. In that case this Court said:

> "The individuals *within the ambit* of the proviso's pertinent provisions are marked by the nature of service performed. * * * *Both the post of duty and character of work are essential elements.* * * * Here, the facts disclose the switchtender on duty for twelve consecutive hours in a *shanty* continuously operated night and day *where,* by the use of the telephone, he received and delivered orders pertaining to train movements."

It is, therefore, very material in this case as to whether or not the Yardmasters under consideration not only came within the *class* described by the statute, and gave or received *orders* over the telephone, but whether or not they were in a *place* referred to by the statute. The act refers to "towers, offices, places and stations." We all know what "towers," "offices," and "stations" are. "Places" of necessity must refer to similar "places" —places like towers, offices and stations.

These Yardmasters, as we have shown in the statement of the case, were not in their office more than one-half or two-thirds of the time, and most of the time while in the yard office, were engaged, while using the telephone, in receiving or sending communications of a commercial

nature, and not in any way connected with the movement of trains. When out of his office the Yardmaster was all over the yard. The yard was no more a "*place*" than would be the railroad.

The conductor referred to in the case of *United States* v. *F. E. C. Ry. Co.* 222 Fed. 33, was no more in a "place" than were the Yardmasters in this case. We invite the attention of the court to all the relevant cases decided under this act, in which penalties have been assessed, and to which we have above referred. In every one of them it appears that the employee involved was duty bound to remain and did remain practically continuously at a "*shanty*" or "office," and there be engaged in his work of receiving or sending "orders" by telephone or telegraph.

The statute, as we contend, and as is well said by this Court in the *C. & A. R. R. Co. case, ubi supra,* only applies to employees defined by the statute, both as to the *post of duty* and *character of work.* These Yardmasters have no such *post of duty* and of necessity do not come within the act.

It is true this Court in the *C. & A. A. R. Co. case, ubi supra,* held that under the facts peculiarly pertinent to that case, the switchtender there involved came within the act. The *character* of his work and the *post* of his duty brought him within the act. That by no means decides that the Yardmasters in this case are within the act.

Conclusion.

We submit for all these reasons that the Circuit Court of Appeals for the Seventh Circuit should have reversed the judgment of the District Court, instead of affirming the same, and that in consequence the judgment entered

by the Circuit Court of Appeals is erroneous and should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1924

No. 898

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY Company, petitioner

v.

UNITED STATES OF AMERICA, RESPONDENT

CONSENT TO THE ISSUANCE OF A WRIT OF CERTIORARI

The Solicitor General consents to the issuance of a writ of certiorari in the above-entitled cause.

Attached hereto is a copy of an official communication, of date February 24, 1925, addressed to the Attorney General by the Secretary of the Interstate Commerce Commission which sets forth the public interest involved and the other reasons which impel the foregoing consent.

JAMES M. BECK,
Solicitor General.

33845—25

INTERSTATE COMMERCE COMMISSION,
OFFICE OF THE SECRETARY,
WASHINGTON, *February 24, 1925.*

GEORGE B. MCGINTY,
Secretary.

The ATTORNEY GENERAL,
Department of Justice,
Washington, D. C.

SIR: In re case of *Atchison, Topeka & Santa Fe Railway Company* v. *United States,* No. 898, pending in the Supreme Court on petition for certiorari to the United States Circuit Court of Appeals for the Seventh Circuit:

This case involves the telegraphers' provision of the Hours of Service Act and its application to railroad yardmasters who use the telephone to receive and deliver orders affecting train movements.

The determination of this question is of vital importance to every railroad in the United States, as well as to those employees and travelers whom the Act seeks to protect. A number of other similar cases in the Seventh Circuit have been continued to abide the final decision in the Santa Fe case, but unless the carriers in other circuits voluntarily change their practice to conform to the decision of the Seventh Circuit Court of Appeals in the Santa Fe case, and no such inclination has so far been manifested, it will necessitate the institution of similar suits in the several circuits, resulting in considerable expense and possibly long drawn out litigation.

And it might be well to call your attention to the fact that the United States Circuit Court of Appeals for the Eighth Circuit, in the case of *Missouri Pacific Railway Company* v. *Unted States* (211 Fed. 893), has taken a view contrary to that expressed by the Seventh Circuit in the Santa Fe case. While the facts were somewhat different in the two cases, yet each involved the doctrine of ejusdem generis, accepted by the Eighth Circuit Court of Appeals, but rejected by the Seventh Circuit.

Therefore, in view of the great importance of the effect of the final determination of the Santa Fe case, of the conflicting decisions now existing in the Seventh and Eighth Circuits, and of the saving of time and money, both to the railroads and the Government, if one universal rule is established at the earliest possible date, the Commission requests, if you can see your way consistently so to do, that you consent to the granting of the petition for certiorari.

Respectfully,
(Signed) G. B. MCGINTY,
Secretary.

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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 273

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY Company, petitioner

v.

THE UNITED STATES OF AMERICA

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

Circuit Judges Alschuler, Evans, and Page concurred in the opinion of the Circuit Court of Appeals (R. 51) (3 Fed. Rep. (2d) 138), which affirmed the judgment of the District Court entered by Judge Cliffe (R. 9) for $600 and costs (298 Fed. Rep. 549).

JURISDICTION

On application of the petitioner under Section 240, Judicial Code, and the Act entitled "An Act

to amend the Judicial Code," etc., approved September 6, 1916 (Ch. 448, 39 Stat. 726), this Court allowed the writ of certiorari, the Government consenting.[1]

STATEMENT

The Atchison, Topeka & Santa Fe Railway was adjudged guilty of violating the Hours of Service Act (Ch. 2939, 34 Stat. 1415) in its Corwith Yard, which is bounded by 38th Street on the north, 47th Street on the south, Kedzie Avenue on the east, and Crawford Avenue on the west, in the city of Chicago.

The Corwith Yard extends in a northerly and southerly direction. The Santa Fe main line enters Chicago from the west and runs in a general easterly and westerly direction between the channels of the Sanitary District on the north and Illinois and Michigan Canal on the south, which are about 500 feet apart.

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[1] In the petition for writ of certiorari it is represented (p. 2) that "some 10,000 yardmasters are affected." In *Missouri Pacific* v. *United States*, 211 Fed. Rep. 893, the Circuit Court of Appeals for the Eighth Circuit took a view contrary to that expressed by the Court of Appeals in the instant case. In view of the large number of employees involved and of these conflicting decisions, the Government consented to the issuance of the writ. Hearings in other cases in the Seventh Circuit have been continued pending the decision of this case.

The group of counsel on the brief for the Santa Fe would indicate that at least four trunk-line railway systems are directly concerned. John G. Drennan, Esq., and E. C. Craig, Esq., are General Attorneys for Illinois Central Railroad; Nelson J. Wilcox, Esq., is Assistant General Solicitor for Chicago & North Western Railway; Homer W. Davis, Esq., is General Attorney for the Santa Fe Railway System; and J. A. Connell, Esq., is Attorney for Illinois District, Chicago, Burlington & Quincy Railroad (Railway Guide, Nov. 1925, I. C., 629; C. & N. W., 784; S. Fe, 925; C., B. & Q., 960).

South and parallel to the channel of the Illinois and Michigan Canal lies the main line of the Chicago & Alton Railroad, in an easterly and westerly direction.

The main line of the Chicago & Alton is about one block, and the main line of the Santa Fe is about four blocks, north of the northern end of Corwith Yard. The main line of Santa Fe and Corwith Yard are connected by two " wye " tracks. The west " wye " is used for moving western inbound and outbound traffic into and out of the Yard. The east " wye " is used for moving eastern inbound and outbound traffic into and out of the Yard.

Across Santa Fe main line straight north from the Yard lies a north and south track known as its 26th Street line, which connects with the Illinois Northern.

The main line of the Chicago & Alton and the Yard are also connected with a " wye " over which traffic moves between the Corwith Yard and Chicago & Alton.

West of the Corwith Yard, a mile and a half, the Chicago & Western Indiana and Belt railroads cross, in a northerly and southerly direction, the Chicago & Alton and Santa Fe main lines. That crossing is controlled by " Nerska Tower," an interlocking plant operated by a man in a tower.

Three miles east of Corwith the Pan Handle tracks cross the main line of Santa Fe at Ash

Street crossing. East thereof is a joint line used by Santa Fe and the Illinois Central; and still farther east and north, at 18th Street and Wentworth Avenue, is located what is known as the 18th Street Yard of the Santa Fe, where another yardmaster is located.

Corwith Yard is the make-up, break-up, assembling, and distributing yard of the Santa Fe for eastbound and westbound freight. Engines from other lines also bring cars to Corwith Yard for delivery to the Santa Fe. Road trains for the West are made up in and leave the Yard.

Bray and McCollom were Santa Fe yardmasters in the Corwith Yard during July, 1921 (R. 12). Bray, mentioned in causes of action 1, 2, and 3, remained on duty from 6 p. m. to 6 a. m.; and McCollom, mentioned in causes of action 4, 5, and 6, remained on duty from 6 a. m. to 6 p. m. (R. 12). The facts with respect to the first three causes of action are the same as in the second three, and the same judgment shall apply to all (R. 11).

The Corwith Yard yardmaster has an office at the north end of the Yard, indicated on the map at 39th Street. He has jurisdiction over and control of all train movements within the Yard. Two blocks north is Corwith Tower (indicated in red) (Pet. Br. 7).

H. F. McCollom is yardmaster whose duties require him " to see the cars," " have the men place them where they belong," and " see that every-

thing is properly handled around the Yard." He has general supervision of the Corwith Yard while on duty. He gives no orders to road trains (R. 15). In his office he has a city phone and a tower phone to Nerska and Corwith (R. 15). When Chicago & Alton trains are ready to come into the Yard, and (R. 15) the towerman sees the Yard is clear, sometimes he gives the Chicago & Alton train the target and lets it into the Yard; *sometimes he calls up the yardmaster. The practice was for the Chicago & Alton towerman to call up the yardmaster* (R. 15).

When a train left the Corwith Yard over the east " wye " to the Santa Fe main line, it was necessary to get the target or signal from the Corwith towerman before the train could proceed. *The yardmaster would either call up the towerman,* or the engineer would blow the whistle for the signal. The object of telephoning the towerman was to keep from blocking things at the north end of the yard, where there is one lead to work on (R. 15).

Trains coming in over the east " wye " whistled, while on the main line, to get the target from the towerman at the Corwith Tower. *Sometimes he would call the yardmaster on duty to find out if the train could come into the yard without blocking it* and sometimes he would not. " If he calls me up, and I find I can take them into the yard, I say to him, ' Let him come.' Trains go from the Yard over the west ' wye ' and enter the Yard therefrom

in the same manner." (McCollom,[2] yardmaster, R. 16.)

On July 7, 1921, such telephone conversations to the number of 13 continued throughout the day by this yardmaster which related to the movement of trains (R. 17–18).

On July 8, 1921, at 6.45, the yardmaster called the Corwith Tower and said, "Local is ready to go." The towerman said, "Let her come," and the yardmaster let her go (R. 18).

Further similar telephone conversations to the number of 23 continued throughout the day, making a total of 24 telephone conversations held that day by this yardmaster which related to the movement of trains (R. 19–20).

For July 9, 1921, counsel for the respective parties agreed that the work of Yardmaster McCollom was substantially the same as on the two preceding days (R. 21).

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[2] Witness H. F. McCollom, Yardmaster, Corwith Yard, testified that on July 7, 1921, he had his first telephone conversation at 6.29 a. m. (R. 16); the telegraph operator at Corwith called and said Extra 3173 would be in at 2 p. m. with 27 perishable; the operator was located at the Corwith freight office; he handled train orders; the purpose of his calling the yardmaster was to give the yardmaster the consist of what was coming, so the yardmaster would know how to handle his power; whether to send an engine out of the yard or not; *that information would help the yardmaster to expedite the movement of trains in and out of the yard* (R. 16, 17).

The next telephone message was at 6.45. Yardmaster called Corwith Tower; "Local is ready to go west"; the object was to get the train across the lead tracks at the north end of the yard without blocking anything and not letting the train pull up to the board until the towerman would give them the signal, which would permit the train to pull out across the C. & A. to the main line of the Santa Fe; that was a local freight train; under our practice, *before I would send a local out, the towerman would advise me over the telephone that it was all right to let it go* (R. 17).

Witness Haushalter, operator and leverman in the Corwith Tower July 7, 8, and 9, 1921, under the superintendent of Terminals of Chicago & Alton, testified that the man with whom he has the most conversation was the yardmaster (R. 27); that he never let a train go into the yard when the yardmaster told him to hold it (R. 28); that he always let them go in when he told him to let them come if he could do so without delaying a superior train; the yardmaster does not always call him up when trains go out of the yard; he gets the whistle signals and gives them the board (R. 28); he does not always call up the yardmaster when a train is going into the yard; it depends on whether there is a C. & A. train due soon; if there is plenty of time he just lets the trains in on the yardmaster, who had information they were coming and he was responsible for taking care of them; they could not go on into the yard if the switches were against them; witness does not have anything to do with the yard switches (R. 28).

Witness further testified that the telephone messages were for *the purpose of expediting the movement of these trains* and not for the purpose of finding out what was the condition of the switches leading into the yard. *The telephone was used in a large majority of cases* (R. 28).

Witness Minchin testified (R. 30) *there are three telephones in the yardmaster's office,* one telephone is between the yardmaster's office and the tower-

man, *the yardmaster is on one end and the towerman on the other* (R. 32).

Opposing counsel emphasize that "no passenger trains go through" (Br. 5). This is far from saying that passenger trains may not be influenced indirectly in their movements by the yardmaster's telephones. Yardmaster McCollom testified (R. 17) that on July 7, 1921, in a telephone conversation at 10.25 a. m. the tower called and said, "Extra 3164 from west," and the yardmaster said, "Let it come," but it did not come because Corwith Tower called back at 10.26, one minute later, and said he would have to hold Extra 3164 for C. & A. No. 1, which was a passenger train. The witness said, "All right." At 10.40 a. m. (R. 18) Corwith Tower said, "Extra 3164 was ready to come." I said, "Let her come." The train came in.

STATUTE

The Act entitled "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon" (Ch. 2939, 34 Stat. 1415), approved March 4, 1907, commonly known as the Hours of Service Act provides:

* * * * *

> SEC. 2. That it shall be unlawful for any common carrier, its officers or agents, subject to this Act to require or permit any employee subject to this Act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such em-

ployee of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty; and no such employee who has been on duty sixteen hours in the aggregate in any twenty-four-hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty: *Provided,* That no operator, train dispatcher, or other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four-hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places, and stations operated only during the daytime, except in case of emergency, when the employees named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four-hour period on not exceeding three days in any week: *Provided further,* The Interstate Commerce Commission may after full hearing in a particular case and for good cause shown extend the period within which a common carrier shall comply with the provisions of this proviso as to such case.

QUESTIONS

Was the yardmaster an "operator, train dispatcher, or other employee"?

Were the telephone messages that the yardmaster received and transmitted "orders"?

Was the Corwith Yard office of the yardmaster in which the telephones were located and used within the words "in all towers, offices, *places,* and stations continuously operated night and day"?

ARGUMENT

SUMMARY

I. THE YARDMASTER WAS AN OPERATOR, TRAIN DISPATCHER, OR OTHER EMPLOYEE, WITHIN THE MEANING OF THE STATUTE. CHICAGO & ALTON v. UNITED STATES, 247 U. S. 197, 200; 244 FED. REP. 945; CHICAGO, ROCK ISLAND & PACIFIC v. UNITED STATES AND CHICAGO & NORTH WESTERN v. UNITED STATES, 226 FED. REP. 27, 30.

II. THE TELEPHONE MESSAGES THAT WERE RECEIVED AND TRANSMITTED BY THE YARDMASTER WERE ORDERS WITHIN THE MEANING OF THE STATUTE. UNITED STATES v. PENNSYLVANIA RAILROAD, 239 FED. REP. 576; CHICAGO, ROCK ISLAND & PACIFIC v. UNITED STATES, 226 FED. REP. 27, 29; DELANO v. UNITED STATES, 220 FED. REP. 635; DISTINGUISHED, UNITED STATES v. FLORIDA EAST COAST RAILWAY, 222 FED. REP. 33.

III. THE OFFICE OF THE YARDMASTER IN THE CORWITH YARD AS HIS "POST OF DUTY" WAS WITHIN THE STATUTE. CHICAGO & ALTON v. UNITED STATES, SUPRA; UNITED STATES v. PENNSYLVANIA RAILROAD, SUPRA; UNITED STATES v. ATCHISON, TOPEKA & SANTA FE, 220 U. S. 37, 43.

I

THE YARDMASTER WAS AN "OPERATOR, TRAIN DISPATCHER, OR OTHER EMPLOYEE" WITHIN THE MEANING OF THE STATUTE

Opposing counsel maintain that "No one can properly contend that, applying the rule of *ejusdem*

generis, a yardmaster would come within the same class of employees as train dispatchers or operators" (Br. 25). The rule has already been rejected by this Court in the construction of this statute.

In *Chicago & Alton Railroad* v. *United States,* 247 U. S. 197, 200, it was maintained that switch tenders, regardless of their use of the telephone in receiving or transmitting orders with respect to the movements of trains, were not, under the rule *ejusdem generis,* within the proviso.[3]

In affirming the judgment of the Circuit Court of Appeals in that case (*C. & A.* v. *United States,* 244 Fed. Rep. 945), which had followed its decisions in *Chicago, Rock Island & Pacific* v. *United States* and *Chicago & North Western* v. *United States,* 226 Fed. Rep. 27, 30, all of which cases had

[3] In that case this Court granted the petition for writ of certiorari. In the brief of counsel for Chicago & Alton, in support of the petition, it is stated that, under the doctrine "*ejusdem generis,*" switch tenders were not within the scope of the statute; and to bring that doctrine into play "there must be substantial similarity in function, not merely in terms, between the persons or things sought to be included by the general words and the specifically named persons or things."

In their final brief counsel for the Chicago & Alton cited *Missouri Pacific* v. *United States,* 211 Fed. Rep. 893, and stated that the "reasoning of Judge Carland in that case and his application of the doctrine of *ejusdem generis* is perfectly in accord with established principles of statutory construction, * * * (C. & A. Br. 48).

In the Government's brief in that case it is stated (Gov. Br. 13) "The entire argument for reversal rests upon an attempted application of what is sometimes known as Lord Tenterden's rule, which has been stated by this Court to be 'that where particular words of description are followed by general terms the latter will be regarded as referring to things of a like class with those particularly described—*ejusdem generis*' (*United States* v. *Mescall,* 215 U. S. 26, 31)."

rejected the rule *ejusdem generis,* this Court, speaking through Mr. Justice McReynolds, in referring to the foregoing decisions, said (247 U. S. 200):

> The individuals within the ambit of the proviso's pertinent provisions are marked by the nature of service performed—an "operator, train dispatcher, or other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements." And the railroad is forbidden to permit one performing such service in "towers, offices, places, and stations continuously operated night and day" to remain on duty therein longer than nine hours in twenty-four. Both the post of duty and character of work are essential elements. If in due course of his work an employee while in any of the locations specified uses the telegraph or telephone for sending or receiving messages concerning train movements, he may not lawfully remain on duty therein exceeding nine hours during any twenty-four-hour period, except in case of emergency.
>
> Here the facts disclose the switch tender on duty for twelve consecutive hours in a shanty continuously operated night and day, where, by the use of the telephone, he received and delivered orders pertaining to train movements—not mere switching movements within the yard; and in such service mental and physical alertness are of great

importance. By permitting this the railroad violated both language and purpose of the act.

In the instant case the learned Circuit Court of Appeals in its decision followed the decision of this Court in the *Chicago & Alton case.*

II

THE TELEPHONE MESSAGES THAT WERE RECEIVED AND TRANSMITTED BY THE YARDMASTER WERE ORDERS WITHIN THE MEANING OF THE STATUTE

Yardmaster McCollom testified (R. 26):

> Q. Now, what was the difference in effect between the yardmaster or the Corwith Towerman calling you up and saying that a train was ready and you replying to him to let her come, and a report that you would send him that a train was ready to go out and he would say, "All Right." What was the difference between those two messages, so far as their effect upon the movement of the train was concerned?
>
> A. There wasn't any, I should say.
>
> The orders given by the telegraph operator to the train crews of road trains give them the right to go out of the yard over the C. & A. crossing, but they can not do that until the Towerman gives them the signal, and they can not go out of the yard if I tell them to stay where they are; but if I don't do anything, and the Towerman gives them the signal, then they can go out.

Witness Haushalter, operator and leverman of the Corwith Tower, testified (R. 28):

> *The telephone messages were for the purpose of expediting the movement of these trains* and not for the purpose of finding out what was the condition of the switches leading into the yard. *The telephone was used in a large majority of cases* (italics ours).

Counsel for the Santa Fe seek to draw a distinction between what they term "orders" and "information" (Br. 29), and they cite and rely on *United States* v. *Pennsylvania Railroad*, 239 Fed. Rep. 570, from which they quote copiously (Br. 30). In that case District Judge Dickinson held that the act which was intended to avoid the danger resulting from exhausted employees must be liberally construed to repress the evil and advance the remedy, and that a yardmaster (who appears to have engaged in duties substantially similar to those in the instant case) was within the statute.

Here again counsel run counter not only to the opinion of this Court in the *Chicago & Alton case* but to the preponderance of opinion in other courts.

In *Chicago, Rock Island & Pacific* v. *United States*, 226 Fed. Rep. 27, 29, *supra*, Circuit Judge Mack, speaking for the Court of Appeals, said:

> Unquestionably, the important object of the statute was to conserve the safety of the traveling public and of railroad employees; the relation between industrial fatigue and inefficiency was recognized; the statute aims to obviate the latter by checking the former. Not merely safety, but general efficiency, promptness of service is thereby promoted.

> Concededly, greater regularity in the passenger service is secured, if the defendant's trains are no longer slowed down and held up at the crossing. Orders designed to accomplish even this result would, therefore, be within the purview of the act.
>
> But who can say that the violation of any order pertaining to or affecting train movements *might* not result in some accident? That other measures obviated the possibility of a collision at the Gresham crossing is immaterial, for surely regularity of service at that point might well prevent an accident at some other point. *The information telephoned by the switchman was equivalent to a direction to the leverman to let the oncoming passenger train pass; an order, originated, it is true, by some superior officer, not by the switchman, but none the less an order transmitted by him* (italics ours).

In *United States* v. *Houston Belt Railway Co.*, 205 Fed. Rep. 347, 348, the Circuit Court of Appeals for the Fifth Circuit said:

> It is contended on behalf of the railroad company that the word "orders" in the statute must be construed to mean what the railroads technically call "train orders"; that is, such orders as emanate from the train dispatcher's office and are reduced to writing and handed to the conductor and engineer of a train. We can not agree with this contention. To do so would be to pervert the plain meaning of the statute. An

order affecting train movements may be given by a wave of the hand or the flash of a lantern, and its disobedience might cause as dire consequences as the failure to obey a written message. Necessarily an order affecting train movements can be given by any subordinate having to do with trains and switches, such as a towerman.

The railroad further contends, however, that the telephone between these towers is not used to transmit " orders " in any sense of the word. Regarding this, it is evident, from the testimony of the towermen quoted above, that they use the telephone to repeat signals from the trainmen which indicate the routing of the train as originally made by the train master; that they give information over it that trains have started, on receipt of which information the other towerman must throw switches, line up tracks, and hold other trains, as a matter of duty and without discretion on his part; and that they run trains in both directions over a single track and instruct the other towermen by the telephone as to holding traffic. It is therefore evident that these towermen use the telephone to dispatch, report, transmit, receive, and deliver orders appertaining to or affecting train movements. To say that these towermen only used the telephone for the giving of information not covered by the statute would be the merest sophistry. Indeed, it is difficult to conceive how anything could be a more imperative

> order affecting train movements than for one towerman to notify another that he had started a train, at the same time telling him to hold all traffic in the opposite direction over the same track.

In *Delano* v. *United States,* 220 Fed. Rep. 635, the Circuit Court of Appeals for the Eighth Circuit held that the carrier is not relieved from liability by requiring a train dispatcher in a night-and-day office to remain on duty for more than 9 hours in each 24-hour period by the fact that during a part of such time he is employed otherwise than as train dispatcher.

In the instant case District Judge Cliffe said (298 Fed. Rep. 551):

> The evidence as to several kinds of messages or orders that McCollum and Bray transmitted over the telephone, it seems to me, tells the story without any question. Certain rules, designated as 521 and 522, provide in effect that "all trains or engines without trains will be under the control of the yardmaster, and all employees in trains or engines will be subject to his instructions," and that he (the yardmaster) "is responsible for the prompt movement of cars, the proper position of the switches, and the expeditious dispatch of trains within the limits of the yards." Outside of the yards on the main lines these trains are directed by the train dispatchers, and, as has been well said in one of the briefs filed herein—

> "It will thus be seen that the expeditious main-line road movements may be advanced, handicapped or retarded by the work of the Corwith yardmaster."
>
> The evidence as to what was actually done by means of the telephone in regard to the movement of trains shows, without question in my mind, that the yardmasters had the general direction of all train movements within the yard limits, and that the use of the telephone by the yardmaster is not occasional or exceptional, but is indeed a part of his usual duties.

In the instant case Circuit Judge Evans of the Circuit Court of Appeals said (3 Fed. Rep. (2d) 138, 139):

> The term "order" has been defined in *United States* v. *H. B. & T. Ry. Co.*, 205 F. 344, 125 C. C. A. 481, and with the conclusions there reached we agree. "Orders," as used in this statute, should not be limited to train orders issuing from the train dispatcher's office. Neither should the term be restricted to orders reduced to writing. Orders may be given by one authorized so to do merely through the wave of a lantern, the movement of arms, or by the change of light in a signal station.
>
> There is a difference, as counsel for plaintiff in error points out, between giving orders and imparting information. This may be well illustrated in a switching operation in the night. The brakeman who

makes the coupling may give information to the conductor by the swinging of his lantern. The conductor will then give a somewhat similar lantern signal to the engineer. Both of these signals are informative, but one is purely so, while the other is primarily an order.

The testimony in the present case does not permit of a conclusion which recognizes the communications that passed between the towermen and switchmen merely as information. The communications that were received or delivered over the telephone were "orders," which the receiving party was not at liberty to ignore. They dealt with the movement and operation of trains. Their form—whether in the nature of a command or worded as a request—is not at all determinative of the question.

Our decision is based upon the conclusion we have reached respecting the nature and necessary effect of the directions which passed between these two employees of the company. We think they were "orders," within the meaning of the statute.

In *United States* v. *Florida East Coast Railway*, 222 Fed. Rep. 33, the Circuit Court of Appeals for the Fifth Circuit held that a train conductor who had no fixed place for work except on a moving train and who, under the first clause of Section 2, may be permitted or required to work 16 hours was not included in the proviso.

III

"THE POST OF DUTY" BROUGHT THE YARDMASTER WITHIN THE STATUTE

Opposing counsel argue that the yardmaster is not within the statute because "the post of duty" of the yardmaster is not embraced within the words "all towers, offices, places, and stations." Here again they say that "'Places' of necessity must refer to similar 'places'—places like towers, offices, and stations" (Br. 46). Further they say "The yard was no more a 'place' than would be the railroad" (Br. 47).

The book of rules of the operating department of the Santa Fe provide (R. 22), "At stations where a yard force is employed, all trains or engines without trains will be under the control of the yardmaster, and all employees in train or engines will be subject to his instructions."

Yardmasters McCollom and Bray received and transmitted these telephone messages in the Corwith Yard. "There are three telephones in the yardmaster's office" (R. 32). When the yardmaster was transmitting and receiving these messages he was not "all over the yard." In the *Chicago & Alton Case, supra,* the place in which the switch tender was on duty was a shanty. The office of the yardmaster certainly rises to the dignity of that standard.

In *United States* v. *Pennsylvania Railroad,* 239 Fed. Rep. 576, on which opposing counsel rely, the

yardmaster apparently was using his office for receiving and transmitting messages precisely as in the instant case.

In *United States* v. *Atchison, Topeka & Santa Fe*, 220 U. S. 37, 43, this Court said:

> We think that the Government is right in saying that the proviso is meant to deal with *all* offices, and if so, we should go farther than otherwise we might in holding offices not operated only during the daytime as falling under the other head (italics ours).

CONCLUSION

The judgment of the Circuit Court of Appeals should be affirmed.

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NOVEMBER, 1925.